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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

JACK TRIMBLE AND JOE TRIMBLE, BY HIS NEXT FRIEND, JACK TRIMBLE,

Petitioners,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY AND BRIEF IN SUPPORT THEREOF.

J. SMITH HAYS,
WILLIAM O. HAYS,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

ANDREW JACKSON TRIMBLE (JACK TRIMBLE), JOE TRIMBLE, AN INFANT BY HIS NEXT FRIEND, JACK TRIMBLE,

Petitioners,

vs.

ZACK JUSTICE AND K. L. ARNOLD, EXECUTORS, ZACK JUSTICE AND K. L. ARNOLD, TRUSTEES, ZACK JUSTICE AND K. L. ARNOLD, STATUTORY GUARDIANS OF JOE TRIMBLE, INFANT APPELLANT, MARY MARGARET TRIMBLE, MAY TRIMBLE, AND JUNE TRIMBLE, INFANTS, INDIVIDUALLY AND BY THEIR STATUTORY GUARDIANS, ZACK JUSTICE AND K. L. ARNOLD, BETTY TRIMBLE, JAMES TRIMBLE, PEM HATCHER, WALTER HATCHER, BRUCE MILLER HATCHER, BETTY HATCHER WEDDLE, JUNE POLLEY.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Andrew Jackson Trimble (sued in this case as Jack Trimble) and Joe Trimble (an infant over

fourteen years of age, by his next friend, Jack Trimble), state they are citizens and residents of Pike County, Kentucky; that James Hatcher, a citizen and resident of Pikeville, Pike County, Kentucky, departed this life September 29, 1939, having made and published his last Will, with codicils thereto; that James Hatcher's Will, with codicils (R. p. 16) was on October 2, 1939, filed in the Pike County Court, Kentucky, proven and probated by proper orders duly entered; that by the Will and orders duly entered Zack Justice and K. L. Arnold were appointed (R. p. 17), executed bond and qualified as executors of James Hatcher's estate; that by his will Zack Justice and K. L. Arnold were appointed Trustees of his estate, (R. p. 20) and by proper orders duly entered they executed bond and qualified as Trustees of James Hatcher's estate; that thereupon they became, have been since, and now are the duly appointed, qualified and acting executors and trustees of the estate of James Hatcher, deceased.

Petitioners state Zack Justice and K. L. Arnold were by proper orders of the Pike County Court, appointed, executed bond and qualified as provided by law, as statutory guardians for the infant petitioner, Joe Trimble, and the infant respondents, Mary Margaret Trimble, May Trimble and June Trimble; that they have been since and now are their duly appointed, qualified and acting statutory guardians; that Zack Justice and K. L. Arnold were appointed, executed bond and qualified as statutory guardians of Jack Trimble, Petitioner, and Betty Trimble, Respondent, who are each now twenty-one years of age.

Petitioners state by his Will James Hatcher conveyed to Zack Justice and K. L. Arnold, Trustees, all of his property of every kind owned at the time of his death (R. p. 20), to be held, managed and controlled for the use and benefit of the seven Trimble children and four Hatcher children (for life with remainder over): James Trimble, Jack Trimble,

Betty Trimble, Joe Trimble, Mary Margaret Trimble, May Trimble, and June Trimble, and Walter Hatcher, Jr., Betty Hatcher, Pem Hatcher and Bruce Miller Hatcher.

Gifts in Contemplation of Death.

Petitioners state James Hatcher, within two years before his death, made the following conveyances and gifts:

Gift to:	*Kind of Property:*	*Date of Gift:*	*Valuation:*
Jack and Joe Trimble,	Hotel property and Residence on Main Street in Pikeville, Kentucky,	Deed dated 10-6-38	$110,000.00
Betty Hatcher,	Vanover Apartments in Pikeville, Ky.,	Deed dated 10-6-38	5,000.00
Mary Margaret Trimble, May Trimble, June Trimble, and Betty Trimble,	Locust Court in Pikeville, Ky.,	Deed dated 10-6-38	35,200.00
Mary Margaret Trimble,	Cash (gift)	1-18-39	4,500.00
June Trimble,	Cash (gift)	1-18-39	4,500.00
May Trimble,	Cash (gift)	1-18-39	4,500.00
Betty Trimble,	Cash (gift)	1-18-39	4,500.00
June Polley,	Cash (gift)	2-10-39	4,300.00
Walter Hatcher, Betty Hatcher, Bruce Miller Hatcher and Pem Hatcher,	Caney Creek Farm, Pike County, Ky.,	Deed dated 1-17-38	676.00
		Total	$173,176.00

Treasury Department Assessment.

Petitioners state after the death of James Hatcher the United States Treasury Department, Internal Revenue Service, assessed and fixed the gross value of the estate of James Hatcher, deceased, for Federal Estate taxes to be $486,801.33, and the net estate for basic Federal Estate tax to be $352,931.29, and the net estate for Additional Federal Estate tax to be $412,931.29, and correctly computed the tax to be $61,036.60; that the executors paid on March 17, 1941, the Collector of Internal Revenue $14,981.10, leaving a deficiency of $46,055.50 (R. pp. 6, 94).

This assessment included in James Hatcher's estate for estate tax purposes the value of the gifts, made within two

years of his death, to Petitioners, Jack and Joe Trimble, in the sum of $110,000.00, and to the Respondents, money and property in all of the value of $63,176.00, making gifts, transfers, totalling $173,176.00.

Petitioners state a controversy arose between the Petitioners, the executors, the trustees, the devisees, and the respondents, about who should ultimately pay the Federal Estate taxes assessed against the estate of James Hatcher, deceased, whether the executors, trustees, or the Petitioners donees and Respondents donees, or the devisees beneficiaries of the Trust.

Suit in Pike Circuit Court.

Petitioners state the executors and trustees brought suit in the Pike Circuit Court, Kentucky, on July 18, 1942, for a declaration of rights between the parties and a settlement of the controversies under Kentucky Statutes, Carroll's Kentucky Civil Code of Practice, Baldwin's Revision 1938, Chapter IVa, Section 639a-1 through 639a-12, copy of the pertinent sections are filed herewith marked Exhibit 1.

Petitioners state Sections 639a-1 and 639a-2 provide any person interested under a deed, will or other instrument of writing or contract, written or oral, or whose rights are affected by statute, municipal ordinance or other government regulation; or who is concerned with any title to property, or who as fiduciary or beneficiary is interested in any estate, may apply for and secure a declaration of his rights or duties, even though no consequential or other relief be asked.

Petitioners state the executors, trustees, alleged in their suit the existence of the controversies between the parties, and took the position the executors of James Hatcher's estate by the payment of the Federal Estate taxes acquired the right to be reimbursed by the donees receiving property from James Hatcher within two years before his death;

that by such right they would be entitled to be reimbursed, $14,823.51, from the Petitioners as a proportionate share of the taxes to be paid by the executors and from others, donees of James Hatcher, before his death, various sums in proportion to the valuation of property given to them, and included in the assessment, in all amounting to $8,532.54 in taxes.

Federal Statutes Drawn in Issue.

Petitioners, Jack Trimble and Joe Trimble, by his guardian ad litem, answered separately (R. pp. 79, 96) denying the right of the executors, trustees, to recover any sum from them, or either of them, on account of the Federal Estate taxes when paid and satisfied by the Executors of James Hatcher's estate; that they affirmed they had no obligation to pay any of the Federal Estate taxes assessed against James Hatcher's estate, and all their liability would end when the taxes were paid by the executors; that it is so provided in effect by the provisions of the Act of Congress of February 10, 1939, c. 2, 53 Statutes 1, and Internal Revenue Department Regulations thereunder a copy of the pertinent sections filed herewith marked Exhibit 1.

Petitioners state under the pleadings there was also drawn in question the validity of the United States Revised Statutes, section 3467, as amended May 10, 1934, a copy of which is filed herewith marked Exhibit 2.

The Executors, Trustees, replied (R. p. 101), traversing the answers.

Provisions of James Hatcher's Will in Issue.

The Petitioners state they pled that under the Will of James Hatcher, deceased, it was provided the executors should pay out of James Hatcher's estate passing to them at his death all the Federal Estate taxes assessed against James Hatcher's estate; that there was no provision in

James Hatcher's will imposing any liability on Jack Trimble or Joe Trimble on account of the conveyance made to them by James Hatcher; that James Hatcher could not burden the absolute gifts made to the donees by any provision of his will which took effect only at the time of his death.

Petitioners state that under the pleadings and issues there was drawn in question the construction of the provisions of the Will of James Hatcher, as to payment of taxes, under the Congressional Acts and under Article 6 and 14th Amendment to United States Constitution.

The provisions of James Hatcher's will as to taxes are:

"ITEM 1. I direct the trustees hereinafter named to pay all my just debts out of the trust funds coming into their hands as soon after my death as practicable."

* * *

"I hereby further authorize and empower my trustees when necessary to borrow money and to mortgage my trust estate therefor for the sole purpose of paying any United States Government, County and State, including income and inheritance, taxes levied or assessed against my said estate left by me by this will."

* * *

"I hereby further authorize empower and direct that out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death, whether the same be a part of this trust estate or not, also to pay all taxes on property deeded by me to the Trimble children and Hatcher children on Ivy and Caney Creeks, and this shall continue throughout the existence of the ten year trust only. The taxes mentioned in this paragraph shall be paid without charging any of the trust property." * * *

"The trustees shall at least twice a year for the first ten year period; on the first day of January and on the first day of July each year; after having paid all ex-

penses, taxes, repairs and allowances as herein provided for;" • • •

"It is my express will and desire that when and if the income of my trust estate, after the expiration and settlement of the first trust of ten years, ever becomes insufficient to pay the taxes and the actual and necessary expenses and upkeep of the trust estate and the trustees for and during the second or thirty-five years trust period and at the same time leave a substantial and sufficient sum out of which to pay the devisees a fair and equitable distribution of the remaining proceeds after the payment of such taxes, expenses and upkeep of the trust fund and trust estate, that then and in that event, the beneficiaries, of whatever number they may be who are entitled to more than one-half of the benefits under and by virtue of my said last will and testament, may petition my trustee for a discontinuance of the second or thirty-five years trust relationship under my said will;" • • •

"3. In the last paragraph at the bottom of page 12 of my said will I have provided for the payment of taxes "on all of the property which I may own at the time of my death, whether the same be a part of this trust estate or not, also to pay all taxes on property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, etc. I hereby revoke the whole of said paragraph at the bottom of page 12 of my said will and in lieu thereof I make the following provisions in the next succeeding paragraph for the payment of taxes:

"I hereby further authorize, empower and direct that out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death, whether the same be part of this trust estate or not, also to pay all taxes on that property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, alone, when and if there are sufficient funds in my general trust fund with which to make such payment of said taxes. But when and if there is no money avail-

able out of my general trust fund for such payment, then I hereby authorize and empower my trustees to make such payment of such taxes for the Ivy and Caney tracts out of the separate trust estate or separate trust funds held by my trustees for my devisees as set forth on page 15 of my said will. If such payment is made out of my general trust fund such payment shall be charged against the devisee or devisees for who such payment was made. And if no funds are available out of either of my general trust fund or out of the separate trust funds held by my trustees for the devisees then such payment or any balance on said taxes shall be made by each devisee or devisees who owe such taxes." * * *

Answers of Respondents.

Petitioners state the adult respondents in the Pike Circuit Court, by their attorney and the infant Respondents, by their Guardian ad litem, answered (R. 74-103), and pled in substance, the executors upon payment of the Federal Estate taxes would acquire the right of contribution from the donees.

The Petitioners state they replied (R. 116), traversing the allegations contained in the answer of the adult and infant Respondents and the issues were completely joined in the Pike Circuit Court.

Petitioners state James Hatcher, by his deed of October 6, 1938, as alleged by the Executors, Trustees, conveyed to Jack and Joe Trimble the James Hatcher residence and Hotel property for life, with remainder over. Petitioners state by this conveyance James Hatcher divested himself of all title to that property, subject alone to such secondary liability for the payment of Federal Estate taxes as is by the Federal Statutes imposed, as security for the payment of the Estate taxes assessed against the estate of James Hatcher, passing at the time of his death, if there is no estate or not enough thereof passing to the executors to

pay the Federal Estate taxes. And in like manner James Hatcher gave to the other donees and devisees, respondents, as set forth herein above.

From these facts it results James Hatcher at the time of his death had no right or title in or to any of the gifts made by him and mentioned in this record. It follows James Hatcher had no power to impose any additional right or debt or even reduce the secondary liability imposed by the Federal Statutes, except as provided by the Federal Statute he might by his will direct how the burden of the Federal Estate tax should be borne by his devisees under his will but not as to donees.

Petitioners state the estate of James Hatcher passing at his death and by his will is amply able to pay the Federal Estate taxes; that the liability of the donees for the payment of James Hatcher's estate taxes becomes primary only in the event there is not sufficient estate in the hands of his executors to pay the Federal estate taxes; that upon the payment of the tax by the Executors their contingent secondary liability is extinguished.

Petitioners state the suit was submitted to the Pike Circuit Court and judgment was on the 2nd day of December, 1942, entered.

Judgment Pike Circuit Court.

Petitioners state the Pike Circuit Court adjudged the executors were required by the Federal Statute to pay the Federal Estate taxes and then erroneously adjudged (R. p. 122) that by such payment the executors acquired a right of reimbursement from the donee Petitioners jointly in the sum of $14,823.51; that by this judgment the court failed to recognize the rights of Petitioners and other donees under the Acts of Congress of February 10, 1939, c. 2, 53 Stat. 1, under Revised Statutes, Section 3467, as amended May

10, 1934, under Article 6 of the Constitution of the United States, and under the 14th Amendment, Section 1, Constitution of the United States, and by said decision and judgment Petitioners were deprived of their immunity to be free from the Federal Estate taxes imposed against James Hatcher's estate when paid by the Executors from the estate of James Hatcher in their hands; that Petitioners then contended they were immune from the Federal Estate taxes when so paid.

Petitioners state by said judgment of the Pike Circuit Court the executors were erroneously adjudged the right to adjust their accounts and keep $14,823.51 of Petitioners' money, which they have in their hands; that the Pike Circuit Court failed to recognize the State of Kentucky by the act of its officers, or any of them, had no power or authority to deprive Petitioners of their property without due process of law; that by this judgment Petitioners have been deprived of their property of the value of $14,823.51 in violation of the 14th Amendment, Section 1, Constitution of the United States of America.

Petitioners state by this judgment the Pike Circuit Court deprived petitioners of their rights under Article 6 of the United State Constitution because it failed to recognize the Federal Statute and decisions of the Supreme Court thereunder as the supreme law of the land.

Petitioners state they excepted to the judgment of the Pike Circuit Court and prayed an appeal to the Court of Appeals of Kentucky, which was granted as a matter of right, as provided by Section 639a-5 of the Kentucky Civil Code of Practice.

Appeal to Court of Appeals of Kentucky.

Petitioners state they prosecuted an appeal from the judgment of the Pike Circuit Court to the Court of Appeals of Kentucky; the highest court of law and equity

in the Commonwealth of Kentucky; that the case was briefed by Petitioners, and Respondents, on the issues, submitted and disposed of in the Court of Appeals by an opinion, Ex. 4, delivered by the whole court on February 16, 1943, reversing the judgment of the Pike Circuit Court in so far as that judgment adjudged the right of reimbursement to the executors from the Petitioners, donees, and other donees, Respondents herein; that the Executors, Trustees, as provided by the rules of the Court of Appeals of Kentucky, filed a petition for a rehearing on the 17 day of March, 1943, and thereafter on the 20 day of April, 1943, Petitioners filed response to the executors' petition for rehearing, and the case was resubmitted.

Petitioners state the Court of Appeals of Kentucky did on June 25, 1943, withdraw the original opinion, and delivered an opinion, Ex. 5, by a Court divided four to three, affirming the judgment of the Pike Circuit Court; that Petitioners thereafter on the 23 day of July, 1943, filed Petition for rehearing, to which Petition for rehearing the Executors, Trustees, filed response. This petition for rehearing with the Executors' response was overruled by the Court on October 5, 1943, when the judgment became final, and the mandate of the Court of Appeals issued.

Petitioners state they in substance argued in briefs in the Court of Appeals of Kentucky, as they had done in the Pike Circuit Court.

Petitioners state the Court of Appeals of Kentucky failed to recognize the rights of Petitioners and other donees under the Acts of Congress of February 10, 1939, c. 2, 53 Statutes 1, under Revised Statutes, Section 3467, as amended May 10, 1934, under Article 6 of the United States Constitution, and under the 14th Amendment, Section 1, of the United States Constitution, and erroneously held

Petitioners were not discharged but the Executors, Trustees, were subrogated to the rights of the sovereign and had the right to collect from Petitioners a pro rata share of the Federal Estate taxes on account of the gifts by James Hatcher to them before his death, by the Executors adjusting their accounts with Petitioners; that by such holding Petitioners were deprived of their immunity from the payment of the tax in violation of the 14th Amendment, Section 1, of the United States Constitution, and there was erroneously imposed upon Petitioners an obligation to pay the $14,923.51, thereby depriving Petitioners of their property without due process of law in violation of the provisions of the 14th Amendment, Article 1, of the Constitution of the United States.

Petitioners state the Court of Appeals of Kentucky failed to recognize the Acts of Congress of February 10, 1939, c. 2, 53 Statutes 1, and Revised Statutes, Section 3467, as amended May 10, 1934, were the supreme law of the land, and erroneously imposed upon Petitioners an alleged rule of equity in Kentucky in its place.

Petitioners state there is no Kentucky Statute or rule of Equity, nor could there be one in a suit like this, without violating the Acts of Congress and the United States Constitution.

Petitioners state they contended, under the Federal Statutes, the issues in the pleadings and the provisions of James Hatcher's will that he had imposed by his will the obligation, as he had a right to do, upon his executors to pay all of his debts, Federal Estate taxes and other taxes from the estate in their hands; and the Court of Appeals erroneously failed to recognize the provisions of James Hatcher's will or to give effect to those provisions or to the Federal Statutes, and erroneously adjudged his will contained no provision directing

the payment of the Federal Estate taxes by his Executors.

Petitioners state Congress by Section 826(c) I. R. C., 26 U. S. C. A. 826(c), authorizing the executors to collect proportionate share of the Federal Estate tax from the beneficiary of life insurance includable in the gross estate, forbids further apportionment by the states against donees, as petitioners' property is not actually handled as a part of the estate by the executors; that Congress by this enactment has reserved to itself the right to determine what properties not passing through the hands of the executor shall pay a proportionate part of the Federal Estate tax. Congress having entered this field, the states are powerless to determine the impact of the tax in such cases.

Petitioners state they did on the 4 day of Dec., 1943, apply to the Court of Appeals of Kentucky for an appeal to the Supreme Court of the United States, which was allowed by an order duly entered.

This Petition for Certiorari is made pursuant to 28 U. S. C. A. 344b. This application is made within three months as allowed by 28 U. S. C. A., Section 350, for a writ to be directed to the Court of Appeals of Kentucky.

Petitioners state until this Court directly passes on the questions here presented, it will be doubtful and many controversies will arise in like or similar situations seriously affecting the proper administration of estates in the United States.

Wherefore Petitioners pray that a writ of certiorari be issued directing the Court of Appeals of Kentucky to certify a full and complete transcript of the record in this suit to the Supreme Court of the United States by a day certain, so this cause may be reviewed and finally determined; that the judgments and orders of the Court of Appeals

of Kentucky, and the Pike Circuit Court, Kentucky, be reversed; that Petitioners be granted all further full and proper relief.

JACK TRIMBLE,
JOB TRIMBLE, By His Next Friend
JACK TRIMBLE,
By J. SMITH HAYS,
Winchester, Ky.;
WILLIAM O. HAYS,
Winchester, Ky.,
Their Counsel.

Dated, Winchester, Kentucky, November 30, 1943.

EXHIBIT 1.

ACT OF CONGRESS OF FEBRUARY 10, 1939, c. 2, 53 STATUTES 1:

Section 810 I. R. C., 26 U. S. C. A. 810.
Rate of tax.
A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title. * * *

Section 822b I. R. C., 26 U. S. C. A. 822b:

(b) Liability for payment. The tax imposed by this subchapter shall be paid by the executor to the collector. 53 Stat. 127.

Section 825a I. R. C., 26 U. S. C. A. 825a:

Discharge of executor from personal liability

(a) Application for discharge. If the executor makes written application to the Commissioner for determination of the amount of the tax and discharge from personal liability therefor, the Commissioner (as soon as possible, and in any event within one year after the making of such application, or, if the application is made before the return is filed, then within one year after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in sections 874 and 875) shall notify the executor of the amount of the tax. The executor, upon payment of the amount of which he is notified, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt or writing showing such discharge.

Section 826b I. R. C., 26 U. S. C. A. 826b:

(b) Reimbursement out of estate. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall

be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

Section 826c I. R. C., 26 U. S. C. A. 826c:

(c) Liability of life insurance beneficiaries. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. 53 Stat. 127.

Section 827b I. R. C., 26 U. S. C. A. 827b:

(b) Upon property of transferee. If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto

is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

TITLE 26—INTERNAL REVENUE

Chapter I—Bureau of Internal Revenue.

Subchapter B—Part 81

REGULATIONS 105

Sec. 81.75 Payment of tax; general.—The tax is due and must be paid within 15 months from the date of death unless an extension of time for payment thereof has been granted by the Commissioner. (See also section 81.79.) If the tax is due 15 months after the decedent's death, the due date is the day of the fifteenth calendar month after his death numerically corresponding to the day of the calendar month on which death occurred, except that, if there is no numerically corresponding day in such fifteenth month, the last day of such fifteenth month is the due date. For example, if the decedent died on August 31, 1939, the due date is November 30, 1940. • • • The collector will grant to the person paying the tax duplicate receipts, either of which will be sufficient evidence of such payment and entitle the executor to be credited with the amount by any court having jurisdiction to audit or settle his accounts.

• • • Until the tax, including any deficiency, is finally determined, the executor should reserve a sufficient portion of the estate to satisfy the liability.

Sec. 81.76 The executor shall pay the tax.—The Internal Revenue Code provides that the executor shall pay the tax. This duty applies to the entire tax, regardless of the fact that the gross estate consists in part of the property which will not come into his possession. If there is no duly qualified executor or administrator, all persons in actual or constructive possession of any property of the decedent are liable for and required to pay the tax to the extent of the value of such property. • • •

EXHIBIT 2.

UNITED STATES REVISED STATUTES, SECTION 3467.

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (R. S. sec. 3467, May 10, 1934, c. 277, sec. 518 (a) 48 Stat. 760.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

JACK TRIMBLE, AND JOE TRIMBLE, BY HIS NEXT FRIEND, JACK TRIMBLE.

Petitioners,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

BRIEF FOR PETITIONERS.

MAY IT PLEASE THE COURT:

Opinions Below.

The judgment of the Pike Circuit Court is found R. Vol. I, page 120.

The first opinion of the Court of Appeals of Kentucky (whole court sitting), reversing the Pike Circuit Court in part, is not and will not be published in the reporters, and is found R. Vol. II, page 135.

The second opinion of the Court of Appeals of Kentucky, affirming the Pike Circuit Court judgment, is found in 173 S. W. (2) 985, Vol. 8 S. W. Advance Sheets dated October 19, 1943, and R. Vol. II, page 153. The minority dissenting opinion is in and at the end of the opinion which became final Oct. 5, 1943.

Jurisdiction.

A statement as to the jurisdiction appears in our petition for certiorari, and the exhibits attached.

Statement of the Case

1. James Hatcher died testate, a citizen of Pike County, Kentucky, September 29, 1939.

2. He died seized and possessed of a net estate of $352,939.29, R. Vol. I, p. 93.

3. His artificial, gross estate amounted to $486,801.33 when the value of gifts made in contemplation of death were included, R. Vol. I, p. 92.

4. The gross estate included the value of a gift by deed dated October 6, 1938, from James Hatcher to Jack Trimble and Joe Trimble jointly for life with remainder over (the whole title) of the James Hatcher residence and total property in Pikeville (R. Vol. I, p. 5) valued at $110,000.00

and it included gifts to the four Trimble girls and others by deeds to them for life with remainder over (the whole title) to property situated in Pikeville, and it included to them and others cash money delivered (R. Vol. I, p. 5), amounting to 63,176.00

in all $173,176.00

5. The tax on the estate after deductions (R. Vol. I, p. 94) amounted to $61,036.60
of which sum the executors have paid 14,981.10

leaving unpaid a balance of $46,055.50

The Federal Statute.

The Act of Congress of February 10, 1939, imposes the estate tax and provides for the assessment thereof. The act imposes the tax upon the estate passing at death, and provides the value of property transferred by gift before death, determined to be in contemplation of death, shall be included in the gross estate, reserving liens as security for the payment of the tax. To this point there is no controversy in this case.

The Federal statute provides the *executor* of the estate shall pay the tax, Title 26, U. S. C. A. 822(b). This means the tax must be paid from the estate passing at death to the executor, here $313,625.33 (R. Vol. I, p. 10). The statute provides when the executor has paid the tax the Commissioner shall issue to the executor duplicate receipts showing the payment of the tax, and enjoins all courts in auditing and settling the estate to give full faith and credit to the receipt, Title 26, U. S. C. A. 823.

It seems clear, when the tax is paid, as provided by the Federal statute, the executor and estate are relieved of further liability; that the executor has acquired no rights, but has only discharged a duty under the Federal statute. The discharge of the executor by the full payment of the tax discharges the debt due the Federal government and any liens or obligations of persons receiving gifts made by the decedent in contemplation of death. This has been the contention of the petitioners in the Pike Circuit Court in their pleadings and briefs in the Court of Appeals of Kentucky. The Pike Circuit Court and the Court of Appeals of Kentucky failed to recognize the effect of the discharge of the debt, and assume and adjudge erroneously the executors have acquired the right of subrogation from the sovereign to be reimbursed as executors or trustees from petitioners Jack and Joe Trimble in the

amount of $14,823.51 (R. Vol. I, p. 122). The language of the Federal statute means the executors and the estate are discharged from all liability on account of the Federal Estate tax when paid. This would be true if James Hatcher had died intestate.

James Hatcher's Will.

James Hatcher by his will (R. Vol. I, p. 16), duly published and probated, directed:

1. His trustees (executors) to pay his "debts." Petitioners claim this includes the Federal Estate tax. Taxes have been held to be debts, *Price* v. *U. S.*, 269 U. S. 492, 70 L. Ed. 373; *Hatch* v. *Morosco Holding Co., Inc.*, 61 Fed. 944; *Breete, et al.* v. *Hill, et al.*, 293 Ky. 526, 169 S. W. (2) 632; and in fact it is a debt arising by the imposition of the tax by the sovereign.

2. His trustees (executors) to borrow money and mortgage his trust estate therefor, for the purpose of paying "any United States Government, County and State, including income and inheritance, taxes levied or assessed against my said estate left by me by this will" (R. Vol. I, p. 29).

3. He further authorizes, empowers and directs that "out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death *whether the same be part of this trust estate or not*, also to pay all taxes on that property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, alone, and this shall continue throughout the existence of the ten year trust only. The taxes mentioned in this paragraph shall be paid without charging any of the trust property."

4. The trustees shall at least twice a year for the first ten year period, on the first day of January and July

each year, after having paid all expenses, *taxes*, repairs and allowances as herein provided for; distribute equally the balance of the income from the trust estate.

5. He expressly provided "when and if the income of my trust estate, after the expiration and settlement of the first trust of ten years, ever becomes insufficient to pay the taxes" and other necessary expenses directed by the will during the thirty-five year trust period, and at the same time leave a substantial sum sufficient to be distributed, "that then and in that event * * * the beneficiaries may petition my trustee for discontinuance of the second thirty-five years trust under my will."

Every time taxes are mentioned the provisions repeatedly direct they are to be paid from his trust estate, which is the estate that passed to his executors and trustees at the moment of his death. The will expressly directs the taxes shall be paid by the executors and trustees, who are the same persons.

The Federal statute provides for the payment of the estate taxes by the executor to the Collector from the estate passing at death, Title 26, U. S. C. A., section 822 (b):

> "The tax imposed by this subchapter shall be paid by the executor to the Collector."

The Federal act allows the testator to provide where the burden of the Federal Estate tax shall rest, and petitioners contend James Hatcher availed himself of that privilege and placed the burden upon his trust estate. Petitioners earnestly insisted neither the Pike Circuit Court nor the Court of Appeals of Kentucky have any right to ignore the Federal Statute or his will or its provisions by erroneously construing in effect it authorized the executors to purchase from the Federal Government a portion of the estate taxes paid, and claim it as a debt against petitioners. It seems they have ignored petitioners' right of immunity from the

burden of debt, estate taxes, and by fiat placed upon the property given to Jack and Joe Trimble, a burden amounting to more than $14,000.

The Fourteenth Amendment of the United States Constitution provides no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Federal Estate tax law provides by section 826(c) the executor may collect a proportionate share of the tax from a beneficiary of life insurance which is included in the gross estate, and section 826(d) authorizes similar procedure against one receiving property subject to a power which is taxable. These sections deal with property which does not pass through the executor's hands. In the case at bar the gift property does not pass through the executors' hands. Congress has invaded this field and directed in what instances the beneficiary of property not passing through the hands of the executors shall contribute to the payment of the tax. Having entered this field and designated two classes that should pay, it follows all other classes in this field were intended to be free from the burden where there was sufficient estate in the hands of the executor to pay the tax. *Riggs* v. *Del Drago, et al.*, 63 S. Ct. 109, U. S. Advance Sheets. The judgments of the Courts of Kentucky compelling contribution from this class of donees, beneficiaries, is an invasion of the field entered by Congress, and it is beyond the power of the States to so act. Congress' entry into this field has preempted to the Congress the right to designate what classes in this field shall contribute. This confers jurisdiction upon this Court.

We submit this Court has jurisdiction of this appeal as the courts of Kentucky have misconstrued the Federal

statutes and violated the provisions of the Sixth Article and Fourteenth Amendment of the Constitution of the United States. We respectfully request a writ of certiorari be granted directed to the Court of Appeals and to the Pike Circuit Court, Kentucky.

Respectfully submitted,

J. Smith Hays,
William Hays,
Counsel for Petitioners.

Dated at Winchester, Kentucky, December 31, 1943.

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CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

JACK TRIMBLE AND JOE TRIMBLE, BY HIS NEXT FRIEND, JACK TRIMBLE,

Appellants,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

APPELLEES' STATEMENT AGAINST THE JURISDICTION OF THIS COURT AND MOTION TO DISMISS AND/OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

LEWRIGHT BROWNING,
J. J. MOORE,
Counsel for Appellees.

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APPELLEES' STATEMENT AGAINST THE JURISDICTION OF THIS COURT AND MOTION TO DISMISS AND/OR AFFIRM THE JUDGMENT OF THE COURT OF APPEALS OF KENTUCKY AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

Appellees move to dismiss the appeal herein and assign the following grounds:

This is an appeal from a judgment of the Court of Appeals of Kentucky. The opinion was handed down on June 25, 1943, and is referred to in Appellants' statement as "Exhibit B".

Appellants have not and cannot comply with Rule 12 of this Court by filing a jurisdictional statement showing that any Federal question, either Constitutional or Statutory,

was called in question or decided by the Kentucky Court. No such questions were raised, either in the court of first instance (Pike Circuit, Kentucky) or Kentucky Court of Appeals.

Hence, as no Federal questions were presented or passed upon by the State Courts, this Court is without jurisdiction to entertain the appeal. The only reference in Appellants' answer, filed in the Pike Circuit Court, with reference to any Federal Statute is as follows:

> "Defendant says that all estate taxes assessed by the United States of America against the estate of James Hatcher, deceased, which assessment includes all property given or conveyed by James Hatcher within two years before his death, should be paid by the executors of said James Hatcher, deceased, from the assets of the estate, as provided by Federal Statute, Internal Revenue Code as amended; that all the estate tax assessed by the United States of America is a debt of the decedent."

The above language is not sufficient to raise any Federal question, either Constitutional or Statutory, or to assert any rights under either. The statement is an erroneous conclusion of the pleader. If he had said the estate taxes should be paid out of said estate, as provided by the Laws of Kentucky, we think it would have been correct as we shall presently point out. However, the court of first instance and the Court of Appeals of Kentucky could not pass upon any Federal question, because no such question was raised.

In *Louisville and Nashville Railroad Company* v. *Woodford*, 234 U. S. 46, 58 Law Ed. 1202, it was held that in order to give this Court jurisdiction, it must appear of record that a Federal question was specifically set up and claimed in the State Court at the proper time and in the proper way, and that the State Court passed upon the question

presented for decision and that its decision was against Appellant.

This Court said:

> "The decisions of this court not only have repeatedly held that a Federal right, in order to be reviewable here, must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question, because it was not raised in the trial court, as required by the state practice. Schuyler Nat. Bank *v.* Bollong, 150 U. S. 85, 37 L. Ed. 1008, 14 Sup. Ct. Rep. 24; Erie R. Co. *v.* Purdy, 185 U. S. 148, 46 L. Ed. 847, 22 Sup. Ct. Rep. 605; Layton *v.* Missouri, 187 U. S. 356, 47 L. Ed. 214, 23 Sup. Ct. Rep. 137. In this case there is no reason to believe that there was an attempt on the part of the state court to evade the decision of Federal questions, duly set up, by unwarranted resort to alleged rules under local practice, and upon this (52) point this case comes within former rulings of this court, as we have seen."
>
> "As to the contention that the case really raised a Federal question because it involved the constitutional validity of a state statute when opposed to the exclusive rights secured under a Federal law,—an examination of the record shows that no such question was made in the state court, nor was it necessarily involved in the decision made, in such sense as to make the case reviewable here on that ground."
>
> "It follows that the case must be dismissed for want of jurisdiction."

As pointed out in *Louisville and Nashville Railroad Company* v. *Woodford, supra,* the Court of Appeals of Kentucky said in same case (152 Ky. 421, 153 S. W. 722) that:

> "The office of the pleadings is to make plain the issues between the parties, and upon the issues thus

raised the parties are entitled to have the case tried."

"Bearing in mind these elementary rules of pleadings and practice, and turning first to the pleadings, we find no federal question suggested anywhere."

"In view of the fact that the question had been nowhere raised by the pleadings, instruction, or motion for a new trial, or by a motion of any kind, we must conclude that it was raised orally, and was discussed as an academic question. But, under Section 115 of the Civil Code of Practice, pleadings are required to be in writing; by subsection 5 of section 317 instructions must be in writing; and under subsection 1 of section 624, even notices are required to be written. A mere oral request of the trial court to instruct upon any given question brings no question before this court for review. Bell *v.* Louisville Railway Co., 148 Ky. 189, 146 S. W. 383."

In *Honeyman* v. *Hanan*, 57 S. Ct. 350, 300 U. S. 14, 81 L. Ed. 476, this Court said:

"We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. Commercial Nat. Bank *v.* Buckingham, 5 How. 341, 12 L. Ed. 180; Lawler *v.* Walker, 14 How. 154, 14 L. Ed. 366; Mississippi & M. R. Co. *v.* Rock, 4 Wall. 180, 18 L. Ed. 382; Parmelee *v.* Lawrence, 11 Wall. 38, 20 L. Ed. 49."

In *Citizens' National Bank* v. *Durr*, 257 U. S. 99, 66 Law Ed. 149, 42 Sup. Ct. Rep. 15, a question similar to the one here presented was before this Court and the Court said:

"A suit for injunction brought in a state court by Anderson against Durr, then auditor, and Cooper, then treasurer, of Hamilton County, Ohio, raised the ques-

tion whether a certain property tax imposed under authority of the State of Ohio upon plaintiff, a resident of that State, by reason of his owning a membership—figuratively termed a 'seat'—in the New York Stock Exchange, infringed his rights under the commerce clause of the Constitution of the United States, on the 'due process of law' or 'equal protection' provisions of the 14th Amendment. His assault upon the tax was sustained by the court of first instance (20 Ohio N. P. N. S. 538), but overruled by the Court of Appeals (29 Ohio C. A. 465), and finally by the Supreme Court of the State (100 Ohio St. 251, 17 A. L. R. 82, 126 N. E. 57). Until the decision of the latter court the Federal right had been asserted merely as a claim of immunity from the tax under the constitutional provisions referred to, without drawing in question the validity of any statute of, or authority exercised under, the State, on the ground of their being repugnant to those provisions. After the final decision, in an application to the Supreme Court for a rehearing, plaintiff for the first time asserted that the decision, if adhered to, rendered the Ohio taxation statutes invalid because of such repugnance. This application was denied without reasons given, and hence must be regarded as having come too late to raise any question for review by this Court. Citing Loeber *v.* Schroeder, 149 U. S. 580, 585, 37 L. Ed. 856, 859, 13 Sup. Ct. Rep. 934; Fullerton *v.* Texas, 196 U. S. 192, 193, 49 L. Ed. 443, 444, 25 Sup. Ct. Rep. 221; Corkran Oil Development Co. *v.* Arnaudet, 199 U. S. 182, 193, 50 L. Ed. 143, 150, 26 Sup. Ct. Rep. 41."

In the instant case, as stated, the Appellants never made any claim in the State Courts that to require them to pay the estate tax would deprive them of any of their rights under the Fourteenth Amendment, or would deny them any right under the Internal Revenue Act.

It is true that some contention was made with respect to this in Appellants' petition for rehearing in the Kentucky

Court of Appeals, but this petition was overruled without giving any reasons.

We submit therefore the appeal should be dismissed for lack of jurisdiction.

The Questions Presented Have Been Decided by This Court. Motion to Affirm the Judgment Appealed From and Deny Petition for Writ of Certiorari.

Appellees move to affirm the judgment appealed from and deny the petition for Writ of Certiorari.

The testator made certain gifts and transfers of property within two years of his death, and it was held by the Federal Revenue Department that same were made in contemplation of death; that they were testamentary in character and should be and were included in the gross estate, pursuant to Sections 811 and 811 (c), I. R. C. (26 U. S. C. A. 811 and 811(c)), and the tax was levied accordingly.

The Pike Circuit Court and the Court of Appeals of Kentucky held that the recipients of the gifts should bear their proportionate part of the Estate Tax; that if and when the Executor paid the tax he was entitled to contribution from the recipients of the gifts.

It is said in Appellants' Assignment of Errors that:

> "Congress by passing the Act of February 10, 1939, c. 2, 53 Stat. 1, as amended, Sections 826 (c) and 826 (d) I. R. C., designated what classes of property not passing through the hands of the Executor should contribute to the payment of the Federal Estate taxes, thereby excluding the right of any State to invade this field and impose upon any other class of property not passing through the hands of the executor the obligation to pay any part of the Federal Estate tax."

Similar contention was made in the recent case of *Riggs* v. *Del Drago* (Advance Sheets 87, Law Ed. 69). It appears

that the Legislature of New York in 1930 amended its decedent estate tax law in relation to Federal and Estate Taxes and Section 124 was challenged. This Court said:

"The question for decision is whether Sec. 124 of the New York Decedent Estate Law, which provides in effect that except as otherwise directed by the decedent's will, the burden of any federal death taxes paid by the executor or administrator shall be spread proportionately among the distributees or beneficiaries of the estate, is unconstitutional because in conflict with the federal estate tax law, Internal Revenue Code, Sec. 800 et seq., 26 USCA 1940 et seq. 800 et seq." • • •

"We are of opinion that Congress intended that the federal estate tax should be *paid out of the estate as a whole* and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax; accordingly, Sec. 124 is not in conflict with the federal estate tax law. This conclusion is based upon the provisions of the Revenue Act of (September 8) 1916, 39 Stat. at L. 756, Chap. 463, and subsequent acts, their legislative history and their administrative interpretation." • • • (Italics ours)

"In the Act of 1916 Congress turned from the previous century's inheritance tax upon the receipt of property by survivors (see Knowlton *v.* Moore, 178 US 41, 44 L ed 969, 20 S Ct. 646; Scholey *v.* Rew, 23 Wall. (U S) 331, 23 L ed 99) to an estate tax upon the transmission of a statutory 'net estate' by a decedent. That act directed payment by the executor in the first instance, Sec. 207, but provided also for payment in the event that he failed to pay, Sec. 208. *It did not undertake in any manner to specify who was to bear the burden of the tax.* Its legislative history indicates clearly that Congress did not contemplate that the Government would be interested in the distribution of the estate after the tax was paid, *and that Congress intended that state law should determine the ultimate thrust of the tax.*" (Italics ours)

See remarks of Congressman Cordell Hull and Congressman Kitchen in footnotes of above opinions in 1916 Acts, before the Ways and Means Committee, and the Committee reports accepting the 1932 Act recognizing that local law determines the ultimate incidence of the Federal Estate Tax.

> "Respondents also rely on Sec. 826 (c), authorizing the executor to collect the proportionate share of the tax from the beneficiary of life insurance includable in the gross estate by reason of Sec. 811 (g), and Sec. 826 (d), 26 USCA 1940 ed Sec. 811 (g), 826 (d), authorizing similar action against a person receiving property subject to a power which is taxable under Sec. 811 (f), as forbidding further apportionment by force of state law against other distributees. But these sections deal with property which does not pass through the executor's hands and the Congressional direction with regard to such property is wholly compatible with the *intent to leave the determination of the burden of the estate tax to state law* as to properties actually handled as part of the estate by the executor." (Italics ours)

In *Edwards* v. *Slocum*, 287 F. at page 653, it is said:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter."

The above opinion was affirmed in 264 U. S. 61, 68 L. Ed. 564, and it was recognized that "the distribution of the burden of taxation among the several beneficiaries is a matter of state regulation."

As said by Chief Justice Cardozo, In Re Oakes 248 N. Y. 280; 162 N. E. 79:

> "Gifts in contemplation of death or to take effect upon death, though made by separate instruments, are for that purpose to be consolidated with those passing

under the will, and the tax payable by the executor is to be computed according to the net value of the aggregate. Farmers' Loan & Trust Co. *v.* Winthrop, 238 N. Y. 488, 144 N. E. 769; Y. M. C. A. *v.* Davis, 264 U. S. 47, 44 S. Ct. 291, 68 L. Ed. 558."

If the States were limited in their right to say where the burden shall be, to only such property as may come into the hands of the personal representative, it would in effect make it impossible for the States in many cases to determine the ultimate impact of the burden, because many estates consist principally of real estate which never comes into or passes through the hands of the Executor or personal representative. To hold as contended by Appellants would destroy the Congressional intent and would in effect reverse the opinions cited and many others.

It is true Kentucky has no Legislative enactment on this question, but the Kentucky Court of Appeals has decided in three cases, as well as the instant case, that where there is no will providing otherwise, all the beneficiaries "shall bear their just proportion of the burden."

In *Hampton's Admr.* v. *Hampton,* 188 Ky. 199; 221 S. W. 496, the Court said:

> "Considering the act as a whole (Secs. 800 et seq. 26 U. S. Ca.) and particularly the provisions with respect to reimbursement and contribution, we cannot escape the conclusion that Congress did not intend to discriminate between the heirs and distributees, but intended that every portion of the estate should bear its proportionate part of the tax, subject, however, to the right of the decedent to provide by will out of what portion of his estate the tax should be paid."

In *Martin, et al.,* v. *Martin's Admr., et al.,* 283 Ky. 513; 142 S. W. (2) 164, the Court said:

> "However, since no such requirement is made in the federal statute (supra) levying the tax, and since it

would, as held in the Hampton opinion, be unjust and inequitable, *we conclude that in the absence of specific direction to the contrary justice requires that all classes of beneficiaries participating in the net value of the estate left after the federal tax is satisfied and deducted should, as between themselves, bear their just proportion of it.*" (Italics ours.)

In *Bingham's Admr.* v. *Commonwealth*, 196 Ky. 318; 244 S. W. 781, the Court said:

> "That Act contemplates its payment (Federal Estate Tax) upon final distribution out of the *entire estate* and by each distributee proportionately, unless otherwise provided by the decedent." (Italics ours.)

The foregoing opinions being from the highest Court are the law of Kentucky, as much so as if the principles announced were embodied in a Statute.

This was decided in *Erie R. Co.* v. *Tomkins*, 304 U. S. 64, 82 L. Ed. 1195, wherein this Court overruled previous decisions and adopted the language of Mr. Justice Holmes in one of his dissents and said:

> "But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else • • • the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (*whether it be of its Legislature or of its Supreme Court*) should utter the last word." (Italics ours.)

Kentucky does not stand alone in adopting this just and equitable rule. See:

Thompson v. *Union Mercantile Trust Company*, 164 Ark. 411; 262 S. W. 324; 37 A. L. R. 536.

Newton's Estate, 28 Pa. Dist. 183.
33 C. J., page 315, Section 108.

It is true that some States, in the absence of a Statute, have decided that this tax must be paid out of the personalty or residue, but as pointed out in *Riggs* v. *Del Drago,* supra, there is nothing in Section 826 (b) U. S. C. A. commanding this.

It is true the Federal Act provides that the Executor shall pay the tax, but this does not change the rights of the beneficiaries, as pointed out in *Martin* v. *Martin's Admr., supra,* wherein the Kentucky Court said:

> "We do not regard as controlling the fact that the primary duty of paying the tax is imposed upon the executor, in view of the fact that the executor may be 'any person who takes possession of any property of the decedent,' and the further consideration that the obligation of the personal representative to pay the tax is a mere rule of administration to insure its payment, and does not in any way effect the rights of the heirs and distributees as among themselves."

The Court said further:

> "The personal representative who has paid, or is to pay the tax of the trust estate, should have the right of subrogation to the position of the sovereign which has received its tax, and to collect from those against whom the tax might have been, under certain circumstances, enforced under the provisions of the federal law had not the tax been promptly paid, or later paid as a debt against the residue."

The Federal Act makes no distinction between property which a person dies the owner of, or transferred in contemplation of death, or which passes through the hands of the Executor. The Estate Tax attaches to all of it.

The Congress has provided by Section 811 and 811 (c) I. R. C. (26 U. S. C. A. 811 and 811 (c)) "that the gross

estate of the decedent shall be determined by including all property * * * including 'transfers' * * * made by decedent within two years prior to his death."

This Court has declared that it is a matter for the States, through its Courts, to determine who shall bear the impact of the burden; that the United States is only interested in collecting the amount due. Hence, the contention made by Appellants is in conflict with the opinions of this Court cited supra.

We therefore submit that the appeal should be dismissed, or the judgment appealed from affirmed.

Respectfully submitted,

J. J. Moore,
Pikeville, Kentucky;
LeWright Browning,
Ashland, Kentucky,
Attorneys for Appellees.

J. P. Hobson,
Henry J. Scott,
Pikeville, Ky.,
Of Counsel.

Dated at Ashland, Kentucky, this 14th day of January, 1944.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

JACK TRIMBLE, AND JOE TRIMBLE, BY HIS NEXT FRIEND, JACK TRIMBLE,

Appellants,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

MOTION FOR LEAVE TO FILE STATEMENT AS TO JURISDICTION.

Come appellants and move the Court for leave to file the Jurisdictional Statement in the above case, because of a misunderstanding of the rules.

Respectfully submitted,

J. SMITH HAYS,
WILLIAM HAYS,
Attorneys for Appellants,
Winchester, Kentucky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

ANDREW JACKSON TRIMBLE (JACK TRIMBLE), JOE TRIMBLE, AN INFANT, BY HIS NEXT FRIEND, JACK TRIMBLE,

Appellants,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

STATEMENT AS TO JURISDICTION.

The jurisdiction of this Court is invoked under 237 (a) and (b) of the Judicial Code, as amended, Title 28, U. S. Code, Section 344 (a) and (b).

The Federal statutes involved on this appeal are:

a. Act of Congress of February 10, 1939, c. 2, 53 statutes 1.

b. U. S. Revised Statute, Section 3467, as Amended May 10, 1934.

The provisions pertinent to this case are:

Section 810 I. R. C. (26 U. S. C. A. 810):

Rate of tax.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net

estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title.
• • •

Section 822b I. R. C. (26 U. S. C. A. 822b):

(b) Liability for payment. The tax imposed by this subchapter shall be paid by the executor to the collector. 53 Stat. 127.

Section 825a I. R. C. (26 U. S. C. A. 825a):

Discharge of executor from personal liability.

(a) Application for discharge. If the executor makes written application to the Commissioner for determination of the amount of the tax and discharge from personal liability therefor, the Commissioner (as soon as possible, and in any event within one year after the making of such application, or, if the application is made before the return is filed, then within one year after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in section 874 and 875) shall notify the executor of the amount of the tax. The executor, upon payment of the amount of which he is notified, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt or writing showing such discharge.

Section 826b I. R. C. (26 U. S. C. A. 826b):

(b) Reimbursement out of estate. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless

otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

Section 826c I. R. C. (26 U. S. C. A. 826c):

(c) Liability of life insurance beneficiaries. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitld to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. 53 Stat. 127.

Section 827b I. R. C. (26 U. S. C. A. 827b):

(b) Upon property of transferee. If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee,

except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

TITLE 26—INTERNAL REVENUE.

Chapter I—Bureau of Internal Revenue.

Subchapter B—Part 81.

Regulation 105.

Sec. 81.75 Payment of tax; general.—The tax is due and must be paid within 15 months from the date of death unless an extension of time for payment thereof has been granted by the Commissioner. (See also section 81.79.) If the tax is due 15 months after the decedent's death, the due date is the day of the fifteenth calendar month after his death numerically corresponding to the day of the calendar month on which death occurred, except that, if there is no numerically corresponding day in such fifteenth month, the last day of such fifteenth month is the due date. For example, if the decedent died on August 31, 1939, the due date is November 30, 1940. * * * The collector will grant to the person paying the tax duplicate receipts, either of which will be sufficient evidence of such payment and entitle the executor to be credited with the amount by any court having jurisdiction to audit or settle his accounts.

* * * Until the tax, including any deficiency, is finally determined, the executor should reserve a sufficient portion of the estate to satisfy the liability.

Sec. 81.76 The executor shall pay the tax.—The Internal Revenue Code provides that the executor shall pay the tax. This duty applies to the entire tax, regardless of the fact that the gross estate consists in part of the property which will not come into his possession. If there is no duly qualified executor or administrator, all persons in actual or constructive possession of any property of the decedent are liable for and required to pay the tax to the extent of the value of such property. * * *

UNITED STATES REVISED STATUTES, Section 3467.

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the per-

son or estate for whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (R. S. sec. 3467, May 10, 1934, c. 277, sec. 518 (a) 48 Stat. 760.)

Judgment, Appealed From.

The judgment of the Pike Circuit Court is found in R. Vol. 1, p. 120.

The first opinion of the Court of Appeals of Kentucky, dated February 10, 1943, (whole court sitting) reversing the Pike Circuit Court in part, is not and will not be published in the Reporters, is found in R. Vol. 2, p. 135, and is attached as Exhibit A to this statement.

The second opinion of the Court of Appeals of Kentucky, dated June 25, 1943, affirming the Pike Circuit Court judgment, may be found in 173 S. W. (2d) 985, Vol. 8, S. W. Advance Sheets, of October 19, 1943, and R. Vol. 2, p. 153, and is Exhibit B to this statement. The minority dissenting opinion is at the end of the opinion of the Court of Appeals, Exhibit B, which became final October 5, 1943, by reason of the denial of petitioners' petition for rehearing on that date.

This appeal is prosecuted under Section 350 of Title 28 of the United States Code.

Nature of the Case, and Rulings Bringing the Case Within the Jurisdictional Provisions.

The petitioners, Andrew Jackson Trimble (sued in this case as Jack Trimble), and Joe Trimble (an infant over 14 years of age, by his next friend, Jack Trimble), state they are citizens and residents of Pike County, Kentucky; that James Hatcher died September 29, 1939, a citizen and resident of Pikeville, Pike County, Kentucky, having made

and published his will with codicils thereto; that James Hatcher's will with codicils, R. Vol. 1, p. 16, was, on October 2, 1939, filed, proven and probated by proper orders duly entered in the Pike County Court; that by the will and orders duly entered Zach Justice and K. L. Arnold were appointed, R. Vol. 1, p. 17, executed bond and qualified as Executors of James Hatcher; that by James Hatcher's will, Zach Justice and K. L. Arnold were appointed Trustees of his estate, R. Vol. p. 20, and by proper orders duly entered, they executed bond and qualified as such Trustees; that they then became, have been since, and now are the duly appointed, qualified and acting Executors and Trustees of the Estate of James Hatcher, deceased.

Petitioners state Zach Justice and K. L. Arnold were by proper orders of Pike Circuit Court, appointed, executed bond and qualified as provided by law as statutory guardians for the infant petitioner, Joe Trimble, and the infant respondents, Mary Margaret Trimble, May Trimble, and June Trimble; that they have been since and now are their duly appointed, qualified and acting statutory guardians; that Zach Justice and K. L. Arnold were appointed, executed bond and qualified as statutory guardians of petitioner, Jack Trimble, and respondent, Betty Trimble, who are each now 21 years of age.

Petitioners state by the will of James Hatcher, all of his property of every kind owned at the time of his death was conveyed to Zach Justice and K. L. Arnold, Trustees, R. Vol. 1, p. 20, to be held, managed and controlled for the use and benefit of the seven Trimble children and four Hatcher children (for life with remainder over): James Trimble, Jack Trimble, Betty Trimble, Joe Trimble, Mary Margaret Trimble, May Trimble and June Trimble, and Walter Hatcher, Jr., Betty Hatcher, Pem Hatcher, and Bruce Miller Hatcher.

Petitioners state James Hatcher within two years of his death conveyed to Jack and Joe Trimble his residence and hotel property in Pikeville, Kentucky, valued for estate tax purposes at $110,000, R. Vol. 1, p. 5.

Petitioners state the Treasury Department, Internal Revenue Service, assessed and fixed the gross value of the Estate of James Hatcher, deceased, for Federal estate taxes, to be $486,801.33, R. Vol. 1, p. 92, and the net estate for Federal estate tax to be $352,931.29, R. Vol. 1, p. 93, and the net estate for additional Federal tax to be $412,-931.29, R. Vol. 1, p. 93, and correctly computed the tax to be $61,036.60, R. Vol. 1, p. 94; that on March 17, 1941, the Executors paid the Collector of Internal Revenue $14,981.10, leaving a deficiency of $46,055.50, R. Vol. 1, pp. 6, 94. Petitioners say this assessment included for estate tax purposes the value of gifts made within two years of James Hatcher's death to petitioners, Jack and Joe Trimble, in the amount of $110,000 and to respondents money and property of the value of $63,176.00, making gifts, transfers, totalling $173,-176.00, R. Vol. 1, p. 5.

This action was instituted by the Executors and Trustees of James Hatcher in the Pike Circuit Court, Kentucky, July 18, 1942, under Kentucky statutes providing for a declaration of rights and a settlement of the controversies between the parties.

The Executors took the position that, by the payment by them of the Federal Estate taxes, they acquired the right to be reimbursed by donees receiving property from James Hatcher within two years of his death; that by such right they would be entitled to be reimbursed $14,823.51 from petitioners as their proportionate share of the estate taxes paid by the Executors, Vol. 1, pp. 3, 101, 103, 106.

Petitioners, Jack Trimble, and Joe Trimble, by his guardian ad litem, answered separately, R. Vol. 1, pp. 79-96, deny-

ing the right of the Executors or Trustees to recover any sum from them or either of them on account of Federal Estate taxes when paid and satisfied by the Executors; they affirmed they had no obligation to pay any of the Federal Estate taxes, and all their secondary liability would end when the taxes were paid by the Executors; that the Estate taxes assessed by the United States are a debt of the decedent; that it was so provided in effect by the Federal Statutes Internal Revenue Code, as amended (R. Vol. 1, pp. 81, 113).

Petitioners pled and contended that under the will of James Hatcher, deceased, it was provided the Executors should pay out of his estate passing to them at his death all Federal estate taxes; that there was no provision in his will imposing any liability on petitioners on account of the conveyance made to them; that James Hatcher could not burden the absolute gifts made to petitioners, by his will which took effect only at the time of his death.

Petitioners state that under the pleadings and issues there was drawn in question the construction of the provisions of James Hatcher's will relative to the payment of taxes under the Congressional acts and under Article 6 and the 14th Amendment to the Constitution of the United States. The pertinent provisions of James Hatcher's will relative to taxes are set forth in Exhibit C to this statement.

Petitioners state the adult respondents by their attorney and the infant respondents, by their guardian ad litem, answered (R. Vol. 1, p. 74,103) and pled in substance the Executors upon payment of the Federal Estate Taxes would acquire the right of contribution from petitioners.

Petitioners state they replied traversing the allegations contained in the answers of the adult and infant respondents, and the issues were completely joined in the Pike Circuit Court. R. Vol. 1, pp. 99-116.

Petitioners state James Hatcher by his deed of October 6, 1938, as alleged by the Executors and Trustees, conveyed to Jack and Joe Trimble the James Hatcher residence and hotel property, for life with remainder over (R. Vol. 1, p. 5); that, by this conveyance James Hatcher divested himself of all title to that property; that it was subject only to such secondary liability for the payment of Federal Estate taxes as is by the Federal statutes imposed, as security, for the payment of the Estate taxes assessed, if there is no estate or not enough thereof passing to the Executors to pay the Federal Estate taxes.

From these facts, it follows James Hatcher at his death had no right or title in or to any of the gifts made by him, and of necessity, had no power to impose any additional lien or debt or even reduce the secondary liability imposed by the Federal statutes, except, as provided by Federal statute, he might by his will direct the burden of the Federal Estate tax should be born by his devisees under his will, but not as to his donees. 826 B. I. R. C. (26 U. S. C. A. 826.)

Petitioners state James Hatcher's estate passing at death to his Executors and Trustees is amply able to pay the Federal Estate tax; R. Vol. 1, p. 117 that petitioners' liability for the payment of James Hatcher's Estate taxes becomes primary only in the event there is not sufficient estate in the hands of his Executors to pay the tax; that upon the payment of the tax by the Executors, petitioners' contingent secondary liability is extinguished.

Petitioners state the Pike Circuit Court adjudged the Executors were required by the Federal statutes to pay the Federal Estate tax and then erroneously adjudged (R. Vol. 1, p. 122) that, by such payment, the Executors acquired a right of reimbursement from petitioners jointly in the sum of $14,823.51; that by so adjudging the Pike Cir-

cuit Court failed to recognize the rights of petitioners under the Acts of Congress of February 10, 1939, c. 2, 56 Statutes 1, under Revised Statute, Section 3467, as Amended May 10, 1934, under Article 6 of the Constitution of the United States, and under the 14th Amendment, Section 1, of the Constitution of the United States; that by said judgment petitioners were deprived of their immunity to be free from the Federal Estate Taxes imposed against the estate of James Hatcher when said taxes were paid by the Executors from his estate in their hands; that the petitioners then contended they were immune from the Federal Estate taxes when so paid.

Petitioners state, by said Judgment, the Pike Circuit Court failed to recognize the State of Kentucky, by the act of its officers or any of them, had no power or authority to deprive petitioners of their property without due process of law; that by the judgment of the Pike Circuit Court petitioners have been deprived of their property of the value of $14,823.51, in violation of the 14th Amendment, Section 1, of the Constitution of the United States.

Petitioners state the judgment of the Pike Circuit Court failed to recognize the Federal statutes and decisions of the Supreme Court thereunder as the supreme law of the land, and deprived petitioners of their rights under Article 6 of the United States Constitution.

Petitioners state they excepted to the judgment of the Pike Circuit Court and prayed an appeal to the Court of Appeals of Kentucky, which was granted. Petitioners state the Court of Appeals of Kentucky is the highest court of law or equity in the Commonwealth of Kentucky; that the case was there briefed by petitioners and respondents on the issues, submitted and disposed of by the Court of Appeals on February 10, 1943, when the judgment of the Pike Circuit Court was reversed in so far as it provided for a contribution and in so far as it provided the Executors

were entitled to reimbursement from petitioners (Exhibit A with this statement); that on March 17, 1943, respondents filed petition for a rehearing and, on April 20, 1943, petitioners filed a response to the Executors' petition for rehearing, and the case was re-submitted. On June 25, 1943 the Court of Appeals of Kentucky withdrew the original opinion and delivered an opinion (Exhibit B with this statement) by the Court, divided four to three, affirming the judgment of the Pike Circuit Court; that on July 23, 1943 petitioner filed petition for rehearing, to which petition the Executors filed response. Petitioners' petition for a rehearing was overruled October 5, 1943, when the judgment became final and the mandate of the Court of Appeals of Kentucky was issued.

Petitioners state they argued in their briefs in the Court of Appeals, as they had done in the Pike Circuit Court; that the Court of Appeals of Kentucky failed to recognize the rights of petitioners under the Acts of Congress of February 10, 1939, c. 2, 53 Statutes 1, under revised Statutes, Section 3467, as amended May 10, 1934, under Article 6 of the United States Constitution, and the 14th Amendment, Section 1, of the United States Constitution, and erroneously held the Executors were subrogated to the right of the Sovereign and had the right to collect from petitioners a pro rata share of the Federal Estate taxes; that by such holding petitioners were deprived of their immunity from the payment of the tax, which was and is in violation of the 14th Amendment, Section 1; that there was erroneously imposed upon petitioners an obligation to pay $14,823.51, thereby depriving petitioners of their property without due process of law.

Petitioners state the Court of Appeals of Kentucky failed to recognize the Acts of Congress of February 10, 1939, c. 2, 53 Statutes 1, and Revised Statute, Section 3467, as amended May 10, 1934, and the opinions of the Supreme

Court construing said statutes were the supreme law of the land, and erroneously imposed upon petitioners an alleged rule of Equity in Kentucky in its place; that there is no Kentucky Statute or rule of Equity, nor could there be one in a suit like this, without violating the acts of Congress and the United States Constitution.

Petitioners state they contended under the Federal statutes, the issues in the pleading, and the provisions of James Hatcher's will, that James Hatcher imposed by his will the obligation, as he had a right to do, upon his Executors to pay all of his debts, Federal Estate taxes and other taxes; that the Court of Appeals erroneously failed to recognize the provisions of James Hatcher's will or to give effect to those provisions or to the Federal statutes, and erroneously adjudged James Hatcher's will contained no provision directing the payment of the Federal Estate taxes by his Executors.

Petitioners state Congress, by 826(c) I. R. C., (26 U. S. C. A. 826(c)) authorizing the Executors to collect proportionate share of the Federal Estate tax from the beneficiaries of life insurance includable in the gross estate, forbids further apportionment by the States against donees, as petitioners' property is not actually handled as a part of the Estate by the Executors; that Congress reserved to itself the right to determine what properties not passing through the hands of the Executors shall pay a proportionate part of the Federal Estate tax and, having entered this field, the States no longer can determine the impact of the tax in such cases.

Petitioners state they did, on December 4, 1943, apply to the Court of Appeals of Kentucky for an appeal to the Supreme Court of the United States, which was allowed by an order duly entered. R. Vol. 2, p. 211 and R. Vol. 4, p. 231.

Cases Believed to Sustain Jurisdiction.

The Federal Estate Tax is imposed upon the net estate, Sec. 810 I. R. C. The value of the gross estate is determined by including the value at death of all property real or personal, tangible or intangible to the extent of the interest of decedent at death. Sec. 811 I. R. C. By this provision the Federal Statute reaches across the dividing line of death into transactions consummated during decedent's life; i. e., gifts in contemplation of death. This has been done here and that question is at rest.

The estate tax is upon the right to transmit property. *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. Ed. 969. An interesting discussion of the right of the sovereign to tax, take a portion of an estate, for the granting of the right to dispose of property at death, see *U. S.* v. *Perkins*, 163 U. S. 625, 41 L. Ed. 287.

In *Y. M. C. A. et al. v. Davis et al.*, 264 U. S. 47, 68 L. Ed. 558, this Court says:

> "What was being imposed here was an excise upon the transfer of an estate upon the death of the owner. It was not a tax upon succession and receipt of benefits under the law, or the Will. It was death duties, as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devices succeeded on death, but the interest which ceased by reason of death."

In *Ithaca Trust Company* v. *U. S.*, 279 U. S. 151, 73 L. Ed. 647, the Court says:

> "The tax is on the act of the testator, not on the receipt of property by the legatees."

Again, in *U. S. Trust Company* v. *Helvering*, 307 U. S. 57, 59 Sup. Ct. Rep. 692, the Court says in discussing Estate Tax:

> "An estate tax is not levied upon the property of which an estate is composed. It is an excise imposed

upon the transfer of or shifting in relationships to property at death."

From these authorities it is clear the Federal Estate tax was and is an obligation of the decedent and in the absence of any testamentary direction should be paid by the executor to the collector.

The prevailing rule is: Where a decedent dies testate making no provision as to the incidence of the tax the residuary estate must bear the estate tax including the portion attributable to specific gifts.

This Court in *Y. M. C. A. et al.* v. *Davis et al., supra,* says:

> "It was wholly within the power of the testatrix to exempt her altruistic gifts from payment of the tax by specific direction to her executor, if she chose. It must be presumed, when she failed to exercise the power, that she intended the incidence of the tax to be where otherwise by law it must be, and, therefore, that it was her purpose that her residuary legatees were to receive all that was left after paying all charges, including this tax, out of her estate. • • •
>
> The gifts are, and were intended by the testator to be, indefinite in amount, and to be what was left after paying funeral expenses, attorneys' fees, executor's compensation, debts of the decedent, and taxes. These donees do not pay the taxes any more than they pay the funeral expenses, the lawyers, the executors, and the testator's debts."

In *Central Trust Company* v. *Barrow,* 144 Kan. 79, 58 Pac. 2d 469, the will contained no direction relative to the payment of taxes. The Court held the recipients of gifts made in contemplation of death were not obligated to reimburse trustees for any portion of the Federal Estate tax assessed against the estate in the computation of which the gifts so made were included. This case is upon all four with the one at bar and disposes of every question.

The following cases and many others announce in substance the same rule:

U. S. v. *Woodward*, 256 U. S. 632, 65 L. Ed. 1131;
Plunkett v. *Old Colony Trust Company*, 233 Mass. 471, 124 N. E. 265;
Estate of Brown v. *Hoge*, 198 Iowa 373, 199 N. W. 320;
Taylor v. *Jones*, 242 Mass. 210, 136 N. E. 382;
Amoskeag Trust Company v. *Trustees of Dartmouth College*, 89 N. H. 341, 200 Atl. 786 (overruling prior opinions of that Court);
Matter of Hamlin, 226 N. Y. 407, 124 N. E. 4, cert. den. 250 U. S. 672;
Newton's Estate, 74 Pa. Super. 361.

Some Courts have considered the tax an administration expense for which the residuary estate is liable.

Estate of Brown v. *Hoge, supra;*
Ely's Estate, 28 Pa. D. & C. 663;
Hapburn v. *Winthrop*, 83 F. 2d 566.

(a) *Estate Tax is a Debt.*

By Sec. 3467, Revised Statute, as amended May 10, 1934, taxes are included within the term debts. This Section is copied on page 3, supra.

This Court in *Price* v. *U. S.*, decided in 1926, 269 U. S. 492, 70 L. Ed. 373, while considering a similar statute said:

> "The word 'debts' as used in Revised Statutes, Section 3466, * * * includes taxes."

Again in *Hatch* v. *Morosco Holding Company, Inc.*, 61 Fed. Sec. 944, decided in 1932, it is said:

> "The statute applies to taxes, since they are embraced within the term 'debts', Price v. U. S., supra."

The Court of Appeals of Kentucky in the recent opinion of *Breete, et al.*, v. *Hill, et al.*, 293 Kentucky 526, 169

S. W. 2d 632, declared taxes to be debts. Item I of James Hatcher's will provides for the payment of his debts. Exhibit "C" with this statement.

(b) *Equity.*

Equity requires the executors to show a right in themselves to recover from petitioners this tax, or an obligation on petitioners to repay them the tax. The executors have not shown and cannot show a right to recover from petitioners as the Congressional Act Sec. 826b, I. R. C. provides petitioners may recover from them. In such a case there can be no equity compelling petitioners to pay.

There is no Legislative Act in Kentucky making any provision for the payment of Federal Estate taxes by donees and as counsel view it there cannot be one in instances such as the present case so long as Sec. 826b, I. R. C. remains in force.

Upon the question of equity Justice Holmes in discussing the Federal Estate tax said:

> "The inequalities charged upon the statute, if there is intestacy, are all inequalities in the amounts that beneficiaries might receive in case of estates of different values, of different proportions between real and personal estate, and of different numbers of recipients; or, if there is a will, affect legatees. As to the inequalities in the case of a will, they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes. As to intestate successors, the tax is not imposed on them, but precedes them; and the fact that they may receive less or different sums because of the statute does not concern the United States." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 41 S. Ct. 506, 65 L. Ed. 963.

The Federal Statutes give the testator the right to direct what property or class of property shall bear the burden of the tax. Appellants contend James Hatcher's will did

actually place the burden upon his estate to be paid by his executors. Most certainly there is no direction in his will charging petitioners with any part of his estate taxes.

As the Federal Estate tax arises by reason of death and is a tax upon the transmission of property at the time of death from the decedent to the living, it must be payable from the estate which actually passes to the executors.

If the Federal Estate tax is paid by the executors, and it must be, under the judgment appealed from, it will be taken from the property actually passing at death to the executors before the remaining property goes into the trust fund created by the decedent's will, and in effect the tax will be paid by the eleven devisees of the trust estate equally, share and share alike. This is equitable as well as legal, as the rights are equal and the burden will be borne equally.

This tax is taken from the estate before the property is set off to the beneficiaries. It is, therefore, not a payment as to which the beneficiaries have any concern. It is not a charge against legatees or distributees or donees.

It is fundamental that the benefaction conferred by a residuary clause of a will is only that which remains after all paramount claims upon the estate of the testator have been satisfied.

In *Plunkett* v. *Old Colony Trust Company*, 233 Mass. 471, 124 N. E. 265, the Court says:

> "The sections of the act prefaced by this heading or title refer exclusively to the value of the 'net estate' as the basis for the ascertainment of the tax. There is no mention whatever in this connection of legacies, devises or distributive shares. They are wholly omitted. The statute ignores utterly the disposition made of the estate by the testator or by the law as to intestate property, and looks only to the net estate itself as defined.

"The words of the act of Congress imposing the tax point strongly toward the interpretation that the tax is on the estate and not on the particular devises, legacies or distributive shares. The words 'net estate' are used uniformly in the operative parts of the act to the exclusion of phrases of other significance.

"It is a general rule that, failing any testamentary provision to the contrary, debts, charges and all just obligations upon an estate must be paid out of the residue of an estate. The benefaction conferred by the residuary clause of a will is only of that which remains after all paramount claims upon the estate of the testator are satisfied." • • • "The tax is a pecuniary burden or imposition laid upon the estate." • • • "In its nature it is superior to the claims of the residuary legatee. Since neither the act of Congress not the will and codicils made any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate."

In *Taylor* v. *Jones et al.*, 210 Mass., 136 N. E. 382, the executor paid the Federal Estate tax and deducted a pro rata share of that tax from a specific bequest. The legatee brought suit to recover the amount of the tax deducted from her legacy. The Court held she was entitled to recover from the executor. This Court denied certiorari in this case in 260 U. S. 742, 67 L. Ed. 481, thereby in effect affirming the State Court decision.

In *Turner* v. *Cole*, 118 New Jersey Eq. 497, 179 Atlantic 115, it was held in the absence of a direction in the will or by a statute, the Federal Estate tax was payable from the estate before distribution and the burden of it could not be placed upon the beneficiary.

It seems *Bemis et al.* v. *Converse et al.*, 246 Mass. 131, 140 N. E. 686, disposes of the alleged rule of equity, when that Court says:

"Courts can not speculate concerning the intention of settlors and testators as to where they intend the

burden of taxes to rest. The instrument as written must govern. Opportunity is freely open in framing trust deeds and wills to make full and accurate expression of desire and intention respecting the payment of taxes and the particular beneficiaries whose shares shall be exonerated from or bear that pecuniary exaction for the support of government. Specific provision on this point is familiar in wills and is not infrequently found in other instruments. In the absence of a definite declaration on the subject it must be presumed that the intention was that the ultimate weight of taxation must rest where the law places it. It can not be presumed that anything else was intended than what is stated in the written instrument. It may be, for aught that now can be known, that the precise result which has happened was intended. There is no jurisdiction in equity to prescribe what may seem fairer than the settlor or testator has declared. To do that is as foreign to chancery principles as to remold a will in order to make it conform to different conceptions of justice or fairness from those indulged by the testator. 'Where no other provision is made taxes must be paid out of the residue of the estate' ".

Can it be argued successfully that James Hatcher did not know what he intended when he gave this property to petitioners, and that his gift shall now be reduced by more than $14,000? Is this equity?

This Court in *Y. M. C. A. et al.* v. *Davis et al.*, supra, says:

> "It was wholly within the power of the testatrix to exempt her altruistic gifts from payment of the tax by specific direction to her executor if she chose. It must be presumed, when she failed to exercise the power, that she intended the incidence of the tax to be where otherwise by law it must be, and therefore, that it was her purpose that her residuary legatees were to receive all that was left after paying all charges, including this tax, out of her estate."

As the Court of Appeals of Kentucky by its first opinion, Exhibit A with this statement, states there is no Kentucky State Statute directing how the tax shall be apportioned and by its second opinion, Exhibit B with this statement, takes the position the will does not direct the payment of the estate taxes. This brings us back to a correct construction of the Federal Estate tax act to determine this case.

(C) *The Congressional Act.*

Section 822b, Title 26 U. S. C. A., page 2, supra, provides the tax imposed shall be paid by the executor to the collector, and Section 826b, Title 26 U.S.C.A., page 2, supra, provides for reimbursement out of the estate.

The judgment appealed from is directly in contradiction to the provisions of Sec. 826b and erroneously imposes a primary personal liability on petitioners to contribute a pro rata part of the estate tax to the executors after the executors have paid the tax in discharge of their obligation.

This Court in *Riggs* v. *Del Drago et al.*, 63 S. Ct. 109, says:

> "We are of the opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property AT DEATH should govern the distribution of the REMAINDER and the ultimate impact of the federal tax;" • • • "This conclusion is based upon the provisions of the Revenue Act of 1916," • • • "and subsequent acts, their legislative history and their administrative interpretation.
>
> "As pointed out before, while the federal statute normally contemplates payment of the tax before the the estate is distributed," • • • (by) "Sec. 822 (b), provision is made for collection of the tax if distribution should precede payment." • • • "If any distributee is thus called upon to pay the tax, Sec. 826 (b) provides that such person 'shall be entitled to re-

imbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate.' By that section Congress intended to protect a distributee against bearing a greater burden of the tax than he would have sustained had the tax been carved out of the estate prior to distribution; any doubt that this is the proper construction is removed by the concluding clause of the section specifically stating that it is 'the purpose and intent of this sub-chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.'" • • •

"In short, Sec. 826 (b), especially when cast in the background of Congressional intent discussed before, simply provides that, if the tax must be collected after distribution, the final impact of the tax shall be the same as though it had first been taken out of the estate before distribution, thus leaving to state law the determination of where that final impact shall be.

"Respondents also rely on Sec. 826 (c)," • • • "826 (d)," • • • "as forbidding further apportionment by force of state law against other distributees. But these sections deal with property which does not pass through the executor's hands and the Congressional direction with regard to such property is wholly compatible with the intent to leave the determination of the burden of the estate tax to state law as to properties actually handled as part of the estate by the executor."

See:

Bemis v. *Converse*, 246 Mass. 131, 140 N. E. 686.

Farmers Loan & Trust Co. v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769.

Beyond doubt Congress intended the States should have the right to control the ultimate thrust of the tax in so far

as the property actually passes through the hands of the executors. In other words, the laws of descent and distribution of the various states should apply to estates the same as if there was no Federal Estate tax, in those instances where the property actually passes through the hands of the executors.

This is not the case involved, for here we have property, the title to which passed from James Hatcher during his lifetime and can never actually pass through the hands of his executors and did not pass at his death to his executors. In this field, Congress has legislated. Life insurance and powers of appointment are instances where Congress directs the donee shall contribute to the payment of the tax. These Congressional provisions by implication exclude all other classes of donees, of which petitioners are one, and who in addition are by Sec. 826 (b) vested with the right to recover any estate tax paid by them. Congress having invaded the field where the property does not actually pass through the hands of the executors, the States no longer have the right to require contribution in such cases.

The Congressional Act vests a right in donees, receiving property or money from the decedent before his death, to sue and recover from the estate in the hands of the executor, or from the estate that has passed through the hands of the executor, or by equitable recovery against persons receiving portions of the estate which has passed through the hands of the executor, to reimburse them for any payment of the tax imposed upon their gifts.

Congress did not overlook the fact donees who received title to property from the decedent before his death were not primarily personally obligated to pay, nor was their gift, the rem, primarily obligated to pay any of the estate tax of the decedent; its language is:

"• • • it being the purpose and intent of this subchapter that so far as is practicable and unless other-

wise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

Chief Justice Cardozo delivered the opinion of the Court of Appeals of New York in the case of *In Re Oakes*, 248 N. Y. 280, 162 N. E. 79. This opinion construes Sec. 826b, Title 26 U. S. C. A. Judge Cardozo states the question:

> "The question to be determined here is the incidence of the Federal tax as between the donee of the shares, who was also the executor, upon the one hand, and the legatees of the residuary estate, upon the other."

The Court then says:

> "The Federal tax, on the contrary, is laid upon the transfer of the estate as a whole, and, primarily at least, is a charge upon the residue.
>
> "What is taxed is 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of death.'
>
> "He (the executor) paid out of the residuary estate the tax due upon the transfer of the shares under the revenue act of Congress.
>
> "There can be no doubt that the executor was justified in discharging the tax out of the residue unless the incidence of the burden has been changed by the condition of the escrow.
>
> "The command of the statute is explicit as to the incidence of the burden" (The Court here quotes 826 b).
>
> "The incidence of the burden thus fixed by statute in terms so unmistakable has not been modified by the will."

Where the decedent dies testate, but makes no provision with respect to the incidence of the tax, the residuary estate must bear the entire tax, including the portion attributable to specific gifts.

Estate of Brown v. *Hoge*, 198 Iowa 373, 199 N. W. 320.
Lakes v. *Lakes's Exer.*, 267 Ky. 684, 103 S. W. 2d 86.

Plunkett v. *Old Colony Trust Co.*, 233 Mass. 471, 124 N. E. 265.

Taylor v. *Jones*, 242 Mass. 210, 136 N. E. 382, cert. den. 260 U. S. 742.

Woodruff v. *Holmes*, 328 Mo. 143, 40 S. W. 2d 616.

Amoskeag Trust Co. v. *Trustees of Dartmouth College*, 89 N. H. 471, 200 Atl. 786.

Matter of Hamlin, 226 N. Y. 407, 124 N. E. 4, cert. den. 250 U. S. 672.

Petitioners state until this Court directly passes on the questions here presented, it will be doubtful and many controversies will arise, under like or similar situations, seriously affecting the proper administration of estates in the United States. Reference is made to the petition for an appeal filed in this cause and to the assignment of errors, R. Vol. 2, pp. 168, 174, and same are made a part hereof.

We urge this Court to note jurisdiction of this cause for final hearing because the Courts below disposed of important and substantial Federal questions in a way that is in conflict with the Federal Statutes, decisions of this Court, and the Constitution of the United States.

Respectfully submitted,

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EXHIBIT "A".

COURT OF APPEALS OF KENTUCKY, FEBRUARY 16, 1943.

JACK TRIMBLE, et al., *Appellants*,

v.

HATCHER'S EXECUTORS, *Appellees*.

Appeal from Pike Circuit Court, Hon. Monroe Fields, Judge.

Opinion of the Court by Commissioner Morris — Affirmed in Part / Reversed in Part

James Hatcher died September 29, 1939; by his will executed October 10, 1938, appellees here, plaintiffs below, were named joint executors of and trustees under the will. The matters discussed arose in a suit for declaration of duties of the fiduciaries as to allocation of taxes against properties conveyed prior to Mr. Hatcher's death, and of a created trust fund.

The federal taxing authorities found the following transfers to be in contemplation of death; On October 6, 1938, Mr. Hatcher conveyed to Jack and Joe Trimble hotel property in Pikeville, valued at $110,000; to Betty Hatcher the Vanover Apartments, value $5,000; to Mary, Betty and May Trimble Locust Court in Pikeville, value $35,200, and on January 17, 1938, to Walter, Betty, Bruce and Pem Hatcher the Caney Creek farm, value $676; January 18, 1939 he made cash gifts to Mary, June, May and Betty Trimble, $4500 each, and on February 10, 1939 to June Polly (not of kin) $4500, a total of $173,176.00. The trust property was valued for tax purposes at $414,000; the total for taxation, after deductions and exemptions, was $412,941.29 upon which the tax was $61,036.60, a portion of which has been paid.

Plaintiffs asked the court to determine from a construction of the will whether or not they should demand a proportionate share of the estates taxes on the values of inter

vivos gifts, admittedly properly levied in contemplation of death, as fixed by federal authorities for purposes of taxation. It was agreed that it was their duty to pay all taxes. Two other questions were submitted, one as to whether or not recipients of the inter vivos gifts, by filing pleadings raising only the question of proper distribution of the tax, stood in danger of forfeiting rights to take under the will, the other as to the right of the representatives to mortgage the trust properties for the purpose of paying the taxes, it being shown that they had no funds to pay a balance of $46,000 on the estate taxes.

Testator in his fifty-eight page will, an exceedingly unique and interesting document, provided that if any devisee or beneficiary who contested the will should receive nothing. The chancellor held the proceeding not to be a contest or effort to challenge any portion of the will, but merely an effort on the part of interested parties to assist the court in determining as to who should ultimately bear the burden of taxes.

Here the suit was instituted by the personal representatives. There had been no objection on the part of any one of them to the probate of the will, nor in the instant proceeding to change or alter any provisions of the will insofar as it undertook to dispose of testator's properties. Authority for sustaining the holding may be found in South Norwalk Trust Co. *v.* St. John, 92 Conn. 168, 101 A. 963; Black *v.* Herring, 79 Md. 146, 28 A. 1063; Mallet *v.* Smith, 68 L. R. A. 447, In re Estate of Andrew Bergland, 5 A. L. R. 1363.

The provision of the will giving the representatives the power to mortgage the trust property for the purpose of paying certain taxes is contained in the will copied infra. The court properly construed the item to give them power to encumber the trust estate for the purposes indicated. The clause speaks for itself. Gaither *v.* Gaither, 288 Ky. 145, 155 S. W. (2) 746.

The other question calls for a construction of several clauses of the will relating to the payment of taxes. After the usual and customary declarations, testator provided that trustees should "pay all my just debts out of the trust

funds coming into their hands as soon after my death as possible." The general trust was created by item No. 8 of the will, which after specific devises and bequests willed to the trustees all undisposed properties for the benefit of great nieces and nephews, and one nephew. We quote pertinent items:

> "I hereby authorize my trustees when necessary, to borrow money and to mortgage my trust estate therefor for the sole purpose of paying the United States Government, County and State, including income and inheritance taxes levied or assessed against my said estate, whether such taxes be against my trust estate or other estate left by me by this will."

Included in item 8 of the body of the will was the following provision, the property mentioned being lands deeded by testator three years prior to his death:

> "I hereby * * * direct that out of the income from the trust property that trustees pay all taxes on all the property I may own at the time of my death, whether the same be a part of this trust estate or not, also to pay all taxes deed by me to the Trimble children, and the Hatcher children, on Ivey and Caney Creek, and this shall continue throughout the existence of the ten year trust only. The taxes mentioned in this paragraph shall be paid without charging any of the trust property."

In a codicil of November 1938, testator wrote:

> "In the last paragraph at the bottom of page 12 of my said will I have provided for the payment of taxes on all the property I may own at the time of my death, whether the same be a part of this trust estate or not, also to pay all taxes on property deeded by me to the Trimble children and Hatcher children on Ivey and Caney Creeks, etc. I hereby revoke the whole of said paragraph of my said will and in lieu thereof I make the following provision * * * for the payment of taxes:

"I hereby further authorize, empower and direct that out of the income from the trust property that the trustees pay all taxes on all the property which I may own at the time of my death, whether the same be part of this trust estate or not, also to pay all taxes on that property deeded by me to the Trimble and the Hatcher children on Ivy and Caney Creeks, alone, and when and if there are sufficient funds in my general trust fund with which to make such payment of said taxes. But when and if there is no money available out of my general trust fund for such payment, then I hereby authorize my trustees to make such payment of such taxes for the Ivy and Caney tracts out of the separate trust estate or separate trust funds held by my trustees for my devisees as set forth on page 15 of my said will. If such payment is made out of my own general trust fund such payment shall be charged against the devisee for who such payment is made. And if no funds are available out of either of my general trust fund or out of the separate trust funds held by my trustees for the devisees then such payment or any balance on said taxes shall be made by each devisee who owe such taxes."

The chancellor reserved, as we must do under the judgment all questions as to allocation of tax payments, save the one of federal estate tax. On this the court adjudged that it was testator's intention to provide for the payment of estate taxes out of the trust fund as against the property disposed of under his will; that he did not intend that the trust should be charged with gift taxes, and that while the executors were primarily liable for payment, they were to have pro rata contribution from those receiving gifts. He found the total net estate subject to estate tax, and the tax to be as above stated, 13.47 per cent of the taxable estate, and adjudged that each gift beneficiary should contribute the percentage on the fixed value of the gifts received.

From this part of the judgment the two Trimble boys, who were given the hotel property, have appealed. The personal representatives cross appeal, and while saying that

they are concerned only for their own protection in carrying out the provisions of the will, in brief counsel takes the position chancellor's judgment was correct, basing their conclusions, as do some appellees, on Hampton's Admr. v. Hampton, 188 Ky. 199, 221 S. W. 496; Martin v. Martin, 283 Ky. 513, 142 S. W. (2) 164, and on the further contention that a construction of the will in respect of payment of estate taxes leads to the conclusion that while such as were to be paid from the trust or income from the trust, it related only to property "left by the will or owned by testator at the time of his death."

The rule is that the federal estate tax is to be paid out of the estate as a whole, and there is no argument against this conclusion. The rule is also that applicable state law as to the devolution of property after death governs the distribution of the remainder, "and the ultimate impact of the federal tax," the federal government not being interested in the distribution of the estate after payment of tax. Riggs, Jr. v. Del Drago, —— U. S. ——, 87 L. Ed. 69. In this case the court was dealing with the effect of a New York statute, which made specific provisions that the federal estate taxes (except as otherwise provided in testator's will) should be spread proportionately among the distributees or beneficiaries of the estate. We have no such statute.

As we read the many cases cited, including Amoskeag Trust Co. v. Dartmouth College, 117 A. L. R. 1191, while the general rule seems to be that the estate tax is a debt against an estate, it is clear that the rule gives way to a state statute dealing with the subject (as in New York) or to the terms or provisions of the will, if there be clear implication that the taxes should fall on the residuary estate, rather than on any particular set of beneficiaries or legatees. And since we have concluded that by clear implication the testator intended that payment of the federal estate tax should rest on the trust property, it is unnecessary to discuss the vigorously argued and plausible proposition that the tax is such a debt against the estate, as should be under the first provision of the will, treated as other debts or claims.

This makes it unnecessary to make further reference to the Martin and Hampton cases, in both of which it appeared that decedents died intestate, nor to discuss the Lakes case, where the will made no reference to payment of any taxes. (Lakes v. Lakes' Exor., 267 Ky. 684, 103 S. W. (2) 85).

The provision in the initial clause referred to "my debts," being debts which he owed at the time of his death, and not to taxes, which matter he frequently mentioned in other parts of his will. As noted above, he authorized the representatives to mortgage the trust property for the *sole* purpose of paying "United States Government, * * * including income and inheritance taxes levied or assessed against my said estate left by me by this will."

There is a clear implication that the trust property should furnish funds to the payment of Government taxes, and a specific provision for mortgaging the property, "when necessary." It may be assumed that testator knew that taxes were to be paid, yet he clearly undertook by his will to place this burden of taxation upon the trust property. The only question here is whether or not the will shows clearly or by implication that it should bear all federal estate taxes.

There is nothing in the entire will to indicate an intention that the recipients of the gifts should bear any part of the burden of that tax, unless it be in the use of the words, "left by me by this will," or "owned by me at death." Construction of other provisions of his will indicate that he treated the gifts as being part of the estate left by his will, which in law, at least, for the purpose of the federal tax is true.

In one clause testator provided that the trustees should settle twice each year for the first ten years, such settlement to be made after payment of all taxes and other charges, the remainder to be equally divided among the eleven named beneficiaries of the trust. In another clause he expressly provided that if the income from his trust estate, after a named period, should be insufficient to pay taxes and necessary expenses, "and at the same time leave a substantial sum out of which to pay the devisees a fair

and distributable share after the payment of taxes," the beneficiaries might, after a certain period, petition for a discontinuance of the thirty-five year trust, indicating (for purpose of construction only) that beneficiaries of the trust should be relieved of tax payments, apparently of all nature. No reason is shown why it was intended that one set should be relieved of taxes, and the other burdened.

It is argued as being contrary to the position taken by some of the parties that in the codicil quoted above it was made obvious that the testator wanted it understood that the trustees should pay taxes only on the property conveyed more than two years before his death to the Trimble and Hatcher children on Caney and Ivy Creeks, these not being included in the trust or the inter vivos gifts.

From a reading of the codicil it may be gathered that what testator had in mind was that as to these particular properties, unless special provision be made, might have to bear taxes, the payment of which was not contemplated in other portions of his will. In this item the testator empowered the trustees to pay out of the income from the trust property all taxes on all of the property "I may own at the time of my death, whether the same be a part of this trust estate or not." He then proceeds to say "also to pay taxes on the property deeded to the Trimble and Hatcher children, alone, when and if there are sufficient funds in my general trust funds with which to make payment of such taxes." The word "alone" from a reading of the context, undoubtedly was intended to mean "only."

He continued by providing that if no general trust funds be available trustees might resort to the special trust fund, indicating that the trusts should bear these taxes. Here appears the only part of the entire will directing that any devisee or beneficiary of gift property should bear any sort of tax. He provided that if "such payment," (without doubt referring to the taxes on the gifts to the Hatcher and Trimble children) is made out of the general or special trust, it should be charged against the devisee or devisees for whom such payment was made.

Here the testator, while dealing with property conveyed more than three years prior to his death, treated the re-

cipients as devisees. It may be conceived that this provision refers alone to future ad valorem or income taxes, yet the language indicates the desire to have all taxes to be borne by the trust, including that on the two pieces of real estate, not inter vivos or in the trust. From this clause it may also be gathered that testator had in mind that in the future, in the administration of the trust, "if and when the income is insufficient," there should be an allocation of taxes against certain devisees. "Testator knew that when he wrote his will his estate, and the income therefrom, was more than sufficient to pay all taxes," particularly succession," and it was apparent from the record that aside from specific bequests the residue of his property was embodied in the trust, which is solvent.

There are other provisions of the will in which it was indicated that the recipients of the inter vivos gifts should receive these properties without the burden of taxes; the farm devised to the Trimble boys; the direction to purchase certain property for the Trimble girls, not to be treated as an advancement; other trust provisions for education to be treated likewise. In fact, except in the one instance above noted, in every item of the will when payments of taxes are to be made they are to come from the trust property or its income.

We do not place the same emphasis as do complainants on the words, "I may own at my death," or "property devised by me by my will." It is said in briefs, and we agree, that testator was a highly intelligent and shrewd business man, skillful in business and trading. That he maintained his clear mental faculties up to the time of his death, and it was also well known that because of his advanced age the federal authorities would include as a part of his taxable estate the property which he had given to donees before his death.

If he knew these things he knew that these gifts would be taxed as a part of his gross estate; that this method of distribution (in contemplation of death) was merely a substitute for testamentary disposition, and knowing this he provided for "Government" taxes to be paid, as all other taxes, except in the one instance by and from the trust property

or its income, with language indicating that there should be no contributions.

Having this view of the meaning of testator's will, it follows that insofar as the only debated question before us is concerned, the allocation of the federal estate tax, the judgment should be reversed to the extent it adjudged contribution. In other respects it is affirmed. Since this is primarily a suit for advice to the fiduciaries, the costs should be paid out of funds in their hands.

Affirmed in part; reversed in part. The whole court sitting.

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VB.
IM.

EXHIBIT "B".

COURT OF APPEALS OF KENTUCKY.

June 25, 1943

JACK TRIMBLE, et al., *Appellants*,

v.

HATCHER'S EXECUTORS, *Appellees*.

Appeal from Pike Circuit Court

Hon. Monroe Fields, Judge.

Opinion of the Court by Commissioner Morris Affirming.

James Hatcher died September 29, 1939, his will was executed October 10, 1938. The matters discussed arose in a suit for declaration of rights and duties of executors and trustees as to allocation of federal estate taxes. Within two years prior to his death Mr. Hatcher conveyed to his great nephews Jack and Joe Trimble the Hatcher Hotel in Pikeville, valued (for tax purposes) at $110,000; to Betty Hatcher the Vanover apartments, $5,000; to four Trimble girls, Locust Court, $35,000; to four Hatcher children, Caney Creek farm, $676.00. He made cash gifts to the Trimble girls, $4500 each, a like sum to June Polly, not of kin.

The taxing authorities found all these to have been made in contemplation of death. The total was fixed by taxing authorities at $173,176, and the value of property passing by will, real estate, notes, cash, insurance, etc., at $313,625.33; after exemptions and deductions the net taxable estate was fixed at $412,931.29, upon which the tax was $61,236.60; $14,764.19 has been paid, leaving the unpaid balance $46,055.00.

Appellees asserting lack of funds to pay the balance asked advice as to whether or not they should collect a proportionate part of the federal estate tax from the beneficiaries of the gifts, admittedly made in contemplation of death. Two other questions are raised: Whether any bene-

ficiary contesting the apportionment of taxes as sought, stands in danger of forfeiting rights to take under the will, and as to the right of trustees to mortgage the trust property for payment of taxes. Testator had written that any devisee or beneficiary who contested the will should take nothing under the trusts. The chancellor correctly held the proceeding to be only an effort of parties to assist the court in determining the tax burden. South Norwalk Trust Co. *v.* St. John, 92 Conn. 168, 101 A. 963; Black *v.* Herring, 79 Md. 146, 28 A. 1063; Mallet *v.* Smith, 68 L. R. S. 447; Estate of Andrew Bergland, 5 A. L. R. 1363. The provision authorizing the pledging of property is copied infra. The court construed this item when read with the whole will to authorize representatives to mortgage the trust property for payment of estate taxes chargeable against the property devised by this will. As to power see Gaither *v.* Gaither, 288 Ky. 145, 155 S. W. (2) 746.

After the customary declarations testator provided that the executors "pay all my just debts out of the trust funds coming into their hands." The two trusts were created by item 8 of the will, which after small specific devises and bequests, gave to trustees the residue for the benefit of great nieces and nephews, and one nephew. The will provided:

> "I hereby authorize my trustees when necessary to borrow money and to mortgage my trust estate therefor for the sole purpose of paying the United States government, county and state, including income and inheritance taxes levied or assessed against my said estate, whether such taxes be against my trust estate or other estate left by me by this will."

In a codicil of November 1938, which modified a portion of clause 8, relating to the same subject, testator wrote:

> "I hereby authorize, empower and direct that out of the *income* from the trust property the trustees pay all taxes on all the property *which I may own at the time of my death*, whether the same be part of this trust estate or not, also to pay all taxes on that property deeded by me to the Trimble and Hatcher children on Ivy and

Caney Creeks, alone, when and if there are sufficient funds in my general trust fund with which to make such payment of said taxes. But when and if there is no money available out of my general trust fund for such payment, then I hereby authorize my trustees to make such payment of such taxes for the Ivy and Caney tracts out of the separate trust estate or separate trust funds held by my trustees for my devisees as set forth on page 15 of my said will. If such payment is made out of my own general trust fund such payment shall be charged against the devisee for whom such payment is made. And if no funds are available out of either of my general trust fund, or out of the separate fund held by my trustees for the devisees, then such payment or any balance on said taxes shall be made by each devisee who owe such taxes."

The chancellor reserved, as we do, questions as to allocation of tax payments, except federal estate tax. The court concluded it was not testator's intention to provide for payment of estate taxes on the inter vivos transfers. That while the executors were primarily liable for payment they were to have pro rata contribution. He found the total tax to be 13.67 per cent of the taxable estate, and adjudged that each recipient of gifts, and those taking under the trust, should pay their proportionate part, based on the percentages.

Appellees, concerned chiefly for their protection, take the position as do some beneficiaries under the trust, that the judgment is correct, basing their conclusions on Hampton's Admr. *v.* Hampton, 188 Ky. 199, 221 S. E. 496; Martin *v.* Martin, 283 Ky. 513, 142 S. W. (2d) 164, further insisting that a construction of the will in respect of tax payments leads to the conclusion reached by the chancellor. The gift recipients contend that the will shows the intention of the testator to be that the federal tax should be paid from the trust property, the residuary estate, and if not so, then under the federal law, as construed, the tax must fall as other debts against the estate, payable as such under our laws of descent and distribution.

It is unnecessary to go into great detail in discussing arguments of the diverse claimants as to the meaning of the will with reference to taxes. The one class contends that by the clause of the will first above quoted, the testator meant that all taxes, including estate taxes, should be paid from the trusts. As against this contention it is argued that if it be conceded that the federal taxes should be paid from the trusts, the clause limited payment to taxes levied against "my trust estate or other estate left by me by this will."

It is also contended that the codicil, supra, showed an intention on the part of testator to have executors pay all taxes from the trusts. It may be noted that this portion of the will, if it is susceptible to the construction contended for by appellants, provided for tax payments, not out of trust funds, but out of the "income from the trust property." It also limits payment in this manner of taxes on property which "I may own at the time of my death." The reference to payment of taxes on the gift to the Hatcher and Trimble children (the Caney Creek farm) in connection with the provision for payment of all taxes from "income" clearly evinces the purpose of payment of ad valorem, and not estate taxes, which the testator no doubt knew would have to be paid promptly.

It is also argued in attempt to show that the intention was that all taxes should be borne by the trust, that testator highly favored those to whom he had made inter vivos gifts, many of whom were beneficiaries of the trusts. In answer to this it is argued that testator showed more concern as to future interest of beneficiaries of the trust. From a reading of the entire will testator was apparently much concerned in the use and protection of all properties and income coming to the hands of beneficiaries.

We do not take these arguments to be conclusive as bearing on the question of the ultimate burden, and must agree with the chancellor that the will did not evince an intention that the trust should bear the estate taxes on gifts made in contemplation of death. As to whether the will manifested intention that the trust beneficiaries should bear their proportions, need not be discussed since there is no com-

plaint from them, and the application of the law in any event would place proportionate burden upon them.

It is recognized at the outset that the opinions of many courts, and relied upon by gift recipients, hold that in the absence of a state statute or provisions of the will providing allocation otherwise, the ultimate burden of federal estate tax falls and remains where the federal statute, as claimed places it, upon the estate, or as some of the opinions hold, upon the residue. Among these cases are *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 68 L. Ed. 558; *Amoskeag Trust Co.* v. *Dartmouth College,* 89 N. H. 471, 200 At. 786; Re Hamlin, 226 N. Y. 407, 124 N. E. 4; *Lakes* v. *Lakes,* 267 Ky. 684, 103 S. W. (2) 86; *Central Trust Co.* v. *Burrow,* 144 Kan. 79, 58 p. (2) 469, and other cited.

For reasons later noted we need not go into a closer analysis of these cases. However, we cannot refrain from observing that in the recent case of *Riggs* v. *Del Drago,* U. S. 87, L. Ed. 69, 142 A. L. R. 1131, the Supreme Court apparently dispelled the notion that the federal taxing law should be construed as placing the tax estate on the residue of the estate. The commentator of the Del Drago opinion appropriately suggests that the ruling in *Y. M. C. A.* v. *Amoskeag,* and other cases cited, is dictum, since the question of final trust of the taxes was not a matter before the court. In the *Del Drago* case the question before the court was the constitutionality of a New York statute which provided a spread of the estate taxes proportionately among distributees or beneficiaries as a whole, in the absence of a contrary provision in the will, a most equitable rule, and one exemplified by this Court in opinions which have controlling bearing on the question here presented, to-wit: The *Martin* and *Hampton* cases, supra, with which to the extent the *Lakes'* case holds otherwise, conflict.

In the *Hampton* case the decedent had died intestate. Under this our laws of descent one-half of the personal estate passed to the widow, with dower in the real estate. The estate there consisted of personalty and real estate, which latter was sold prior to distribution. The administrator contended that the federal tax should be borne by

the personal property, and the widow not entitled to any portion of such until the tax was paid. The trial court adjudged that the tax, payable before distribution, should be deducted from the entire estate, the widow to pay such part as the value of all the property by law allotted to her bore to the entire estate. In affirming the lower court we said:

> "In view of the inequality that would result, we are reluctant to adopt the view that the estate tax is a charge on the personal estate, unless compelled to do so by the act itself. We do not regard as controlling the fact that the primary duty of paying the tax is imposed upon the executor, in view of the fact that the executor may be 'any person who takes possession of any property of decedent,' and the further consideration that the obligation of the personal representative to pay the tax is a mere rule of administration, to insure its payment, and does not in any way affect the rights of the heirs and distributees as among themselves."

We concluded that the federal law did not intend to discriminate between the widow, heirs and distributees, but that all the *taxable* estate should bear its proportionate part, subject to the right of a decedent to otherwise provide by will. We held that the estate tax, under our law, could not be regarded as a debt within the meaning of our statute. *Martin* v. *Martin's Admr., supra,* presented a similar question, whether or not the federal estate tax should be borne equally by the beneficiaries as between themselves, regardless of the character of property received from the estate, or whether the tax should be borne exclusively by the personalty left by the decedent, "thus discriminating against and reducing the amount which the distributees of the latter class of property (real estate) would receive under our statute of descent and distribution."

Martin had died intestate, the owner of real and personal property upon which the estate tax was around $19,000. The value of the real property greatly exceeded that of the personalty. The trial court held that the tax should be

borne equally by those to whom the personal property would go, and those taking the real property, in the proportion of the value thereof received by each. The court pointed out that it was urged to reverse the *Hampton* case because of its claimed unsoundness. This we refused to do, digesting numerous cases relied upon by appellant, finding them to be cases where the decedent died testate, and wherein the "inference was drawn by the courts dealing with the question that he had a right to direct in his will how the federal burden should be distributed, and not having done so, it would be presumed that he intended for the personalty * * * to bear the burden of the tax * * * which as we have said operate to the detriment of the legatees to whom he had given the personal property, and relieve his devisees to whom he gave his real estate."

We further said: "Moreover, a number of those cases do not deal with the question we have here, except insofar as they attempt to define the nature of the federal demand, which those opinions conclude is an estate tax, collectible by the government from every class of property of the decedent, whether in the hands of the immediate takers, or transferees for a period of ten years after the death of decedent, but with the provision that for the convenience of administration the personal representative * * * must pay the exacted amount to the federal government, and which it was possibly contemplated would be paid out of the personalty, if there was enough of it before any distribution * * *."

We cited Bingham's Admr. v. Com., 196 Ky. 318, 244 S. W. 781, finding that while disputed question arose in a different manner, the court had approved the doctrine in the *Hampton* case. We closed by saying, "We conclude that in the absence of specific direction to the contrary, justice requires that all classes of beneficiaries participating in the net value of the estate, left after the payment of federal tax is satisfied and deducted, should, as between themselves, bear the just proportion of it."

Counsel for appellees rely on Lakes v. Lakes Exor., 267 Ky. 684, 103 S. E. (2) 86. This case like others we have observed (save perhaps the *Burrow* case) does not involve

the precise question here. Mr. Lakes died testate; on the day he wrote his will he executed deeds to several of his children, they to be effective upon his death. To three others he devised $9,000 each, the residue to be divided among all the children. The executors paid in part the three cash bequests. Payment of the balance had been delayed and the three who had been bequeathed cash filed suit for the balance, asking also for declaration as to whether or not they should be charged with any part of the federal estate tax. The lower court held that none of the three should be so charged, and the executor cross appealed from that portion of the judgment.

While the opinion does not show the fact, we have examined the record and find that the children to whom testator had conveyed real estate, were not parties to the suit, or if so did not raise the question as to payment of estate taxes on gifts, undoubtedly of testamentary character. The Lakes' will made no mention of taxes, though he directed payment of his debts. There was certain language in testator's will, as we found, to indicate that it was his desire to have the three beneficiaries receive the exact amounts of cash bequeathed. By thus concluding the effect was to place the burden of federal estate taxes on the residue of the estate, hence there was no necessity for the holding that the estate tax is a tax against the estate, not to be charged against those who received cash bequests. This ruling in our opinion ran counter to the principles announced in the Hampton and Martin opinions.

There may arise many cases, as seems to be the case here, where the personal representative is without funds to pay the heavy estate taxes upon the estate created by the revenue law. The inclusion in such gross tax estate of the value of property passing under power of appointment, or gifts in contemplation of death, would frequently create that situation. The personal representative who has paid, or is to pay the tax out of the true estate, should have the right of subrogation to the position of the sovereign which has received its tax, and to collect from those against whom the tax might have been, under certain circumstances, enforced under the provisions of the federal law had not the tax been promptly paid, or later paid as a debt against

the residue. Aside from these observations, we adhere to our conclusions in the Hampton and Martin opinions to the extent they hold that the federal estate tax is not a tax against the estate, save and except that it must be paid therefrom, for the benefit and convenience of the taxing authorities. It follows that the judgment of the trial court is affirmed.

The whole court sitting. Chief Justice Fulton concurs in so much of the opinion as holds that the will did not manifest an intention on the part of testator as to the final burden of estate taxes. Judges Rees and Cammack dissent because they are of the opinion that the will manifests an intention on the part of the testator that the trusts should bear the estate taxes. All three dissent from that portion of the opinion which holds that the estate tax is not to be paid from the residue, or the trust estate.

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Attorneys for Appellees: J. J. Moore, Pikeville, Kentucky (for Zach Justice & K. L. Arnold); J. P. Hobson, Jr., & Henry J. Scott (for Walter Hatcher, et al.); J. P. Hobson, Jr. (for Betty Trimble, et al.).

IM.

EXHIBIT "C".

Provisions of James Hatcher's Will Relative to Taxes.

The provisions of James Hatcher's will relative to taxes, and in issue in this suit, are:

> "Item 1. I direct the trustees hereinafter named to pay all my just debts out of the trust funds coming into their hands as soon after my death as practicable." * * *
>
> "I hereby further authorize and empower my trustees when necessary to borrow money and to mortgage my trust estate therefor for the sole purpose of paying

any United States Government, County and State, including income and inheritance, taxes levied or assessed against my said estate left by me by this will." • • •

"I hereby further authorize, empower and direct that out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death, whether the same be a part of this trust estate or not, also to pay all taxes on property deeded by me to the Trimble children and Hatcher children on Ivy and Caney Creeks, and this shall continue throughout the existence of the ten year trust only. The taxes mentioned in this paragraph shall be paid without charging any of the trust property." • • •

"The trustees shall at least twice a year for the first ten year period; on the first day of January and on the first day of July each year; after having paid all expenses, taxes, repairs and allowances as herein provided for;" • • •

"It is my express will and desire that when and if the income of my trust estate, after the expiration and settlement of the first trust of ten years, ever becomes insufficient to pay the taxes and the actual and necessary expenses and upkeep of the trust estate and the trustees for and during the second or thirty-five years trust period and at the same time leave a substantial and sufficient sum out of which to pay the devisees a fair and equitable distribution of the remaining proceeds after the payment of such taxes, expenses and upkeep of the trust fund and trust estate, that then and in that event, the beneficiaries, of whatever number they may be who are entitled to more than one-half of the benefits under and by virtue of my said last will and testament, may petition my trustee for a discontinuance of the second or thirty-five years trust relationship under my said will;" • • •

"3. In the last paragraph at the bottom of page 12 of my said will I have provided for the payment of taxes "on all of the property which I may own at the time of my death, whether the same be a part of this

trust estate or not, also to pay all taxes on property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, etc. I hereby revoke the whole of said paragraph at the bottom of page 12 of my said will and in lieu thereof I make the following provisions in the next succeeding paragraph for the payment of taxes:

"I hereby further authorize, empower and direct that out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death, whether the same be part of this trust estate or not, also to pay all taxes on that property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, alone, when and if there are sufficient funds in my general trust fund with which to make such payment of said taxes. But when and if there is no money available out of my general trust fund for such payment, then I hereby authorize and empower my trustees to make such payment of such taxes for the Ivy and Caney tracts out of the separate trust estate or separate trust funds held by my trustees for my devisees as set forth on page 15 of my said will. If such payment is made out of my general trust fund such payment shall be charged against the devisee or devisees for whom such payment was made. And if no funds are available out of either of my general trust fund or out of the separate trust funds held by my trustees for the devisees then such payment or any balance on said taxes shall be made by each devisee or devisees who owe such taxes." * * *

No. 577. TRIMBLE ET AL. *v.* JUSTICE ET AL., EXECUTORS, ET AL. Appeal from and on petition for writ of certiorari to the Court of Appeals of Kentucky. February 14, 1944. *Per Curiam:* The motion for leave to file the statement as to jurisdiction is granted. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a). The petition for writ of certiorari is denied. *Mr. J. Smith Hays* for appellants-petitioners. *Messrs. LeWright Browning* and *J. J. Moore* for appellees-respondents. Reported below: 295 Ky. 178, 173 S. W. 2d 985.